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No. 95-

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

KATHERINE SABELKO and NANCY BARTO,
Petitioners,

v.

THE CITY OF PHOENIX, SKIP RIMSZA, in his official capacity as Mayor of the City of Phoenix, and THELDA WILLIAMS, FRANCES EMMA BARWOOD, CRAIG TRIBKEN, JOHN NELSON, KATHY DUBS, SALOMON F. LEIJA, and CALVIN C. GOODE, in their official capacity as members of the City of Phoenix City Council,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR WRIT OF CERTIORARI

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133 pp

QUESTIONS PRESENTED

The City of Phoenix enacted an ordinance requiring any person engaging in "demonstration activity" within 100 feet of a "health care facility" to withdraw, upon request, to a distance at least eight feet away from the person making such a request. The District Court declared this "Bubble" Ordinance unconstitutional, but a divided panel of the Ninth Circuit reversed.

1. Does a "Bubble" Ordinance imposing an "audience veto" on peaceful expression in a public forum violate the First Amendment?

2. Did the Ninth Circuit err by holding that the "captive audience" doctrine applies to people using public sidewalks?

3. Is a "Bubble" Ordinance unconstitutional under this Court's decision in *Madsen v. Women's Health Center, Inc.*, 512 U.S. ___, 114 S.Ct. 2516 (1994), which struck down an injunction forbidding "approaching" persons without their consent, *id.* at 2529?

4. Does the Phoenix "Bubble" Ordinance violate the right to free speech under the First Amendment?

PARTIES

The caption of the case contains the names of all parties. There are no parent companies or nonwholly owned subsidiaries.

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PETITION FOR WRIT OF CERTIORARI

DECISIONS BELOW

The decision of the United States Court of Appeals for the Ninth Circuit is reported as *Sabelko v. City of Phoenix*, 68 F.3d 1169 (9th Cir. 1995). App. 1a. The order denying the petition for rehearing with suggestion for rehearing en banc is not reported. *Sabelko v. City of Phoenix*, No. 94-15495 (9th Cir. Dec. 8, 1995). App. 20a. The decision of the United States District Court for the

District of Arizona is reported as *Sabelko v. City of Phoenix*, 846 F.Supp. 810 (D. Ariz. 1994). App. 22a.

JURISDICTION

The decision of the United States Court of Appeals for the Ninth Circuit was entered on October 19, 1995. The Court of Appeals entered its order denying the petition for rehearing and rejecting the suggestion for rehearing en banc on December 8, 1995. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND ORDINANCE

I. United States Constitution

The First Amendment to the United States Constitution provides as follows:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const., Amend. I.

The first section of the Fourteenth Amendment to the United States Constitution provides as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property,

without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const., Amend. XIV, § 1.

II. Ordinance

Sec. 23-10.1 IMPEDING ACCESS TO HEALTH CARE FACILITIES.

A. It is unlawful for any person, in the course of demonstration activity within the access area of a health care facility, to fail to withdraw upon a clearly communicated request to do so to a distance of at least eight (8) feet away from any person who has made the request.

B. For purposes of this section:

1. "Access area" means any portion of a public street or other public place or any place open to the public within one hundred (100) feet of an exterior wall or entryway of a health care facility.

2. "Demonstration activity" includes but is not limited to protesting, picketing, distributing literature, attempting to impede access, or engaging in oral protest, education or counseling activities.

3. "Health care facility" means any hospital, clinic, office, building or other place used to provide medical, psychological, nursing or other health care services, including family planning counseling and pregnancy-related services.

C. For purposes of this section, distance shall be measured from that part of the closest demonstrator's body that is nearest to the closest part of the requesting person's body. The term "body" includes any natural or artificial extension of a person's body including but not limited to an outstretched arm or a hand-held sign. See App. 56a.

STATEMENT OF THE CASE

In this case, a divided panel of the Ninth Circuit upheld the constitutionality of a City of Phoenix "Bubble" Ordinance that makes it a crime to do nothing more than engage in peaceful and nonthreatening expression within eight feet of an audience or bystander that does not wish to hear or see the message. *Sabelko v. City of Phoenix*, 68 F.3d 1169 (9th Cir. 1995). This provision, codified as an ordinance of general applicability, is substantially similar to a provision held unconstitutional in *Madsen v. Women's Health Center, Inc.*, 512 U.S. ___, 114 S.Ct. 2516 (1994). The District Court had held the "Bubble" Ordinance unconstitutional on First Amendment grounds, *Sabelko v. City of Phoenix*, 846 F.Supp. 810 (D. Ariz. 1994), but the divided Ninth Circuit panel reversed.

I. Petitioners

Petitioners engage in peaceful hand-to-hand leafletting and one-on-one sidewalk counseling about abortion and abortion alternatives. Petitioners have never been arrested or charged with any criminal or civil violation or offense. They strongly oppose violence, harassment, and lawlessness. They have no desire to block or physically impede access to an abortion facility. In their expressive activities, they have never intentionally touched or harassed anyone or expressed themselves other than in a peaceful and nonconfrontational manner. CR 4, 5.

To be effective, Petitioners' counseling must be conducted in a quiet tone of voice on a one-on-one basis, with the communication of empathy and supportive body language, and with eye contact in close proximity to the person counseled. The eight feet restriction requires Petitioners to raise their voices if they wish to be heard over ambient street noise. Speaking in a loud voice prevents empathy and sometimes even causes stress in the person they are addressing. CR 4, 5, 36.

As a consequence of the enactment of the "Bubble" Ordinance, the Petitioners curtailed their expressive activities because of fear of prosecution under the Ordinance. CR 4, 5.

Phoenix abortion facilities employ "escorts" who attempt to prevent the communication of anti-abortion literature and information, by Petitioners and other pro-life activists, to persons accessing the abortion facilities. The "escorts" place themselves between anti-abortion leafletters and counselors and the persons to whom they are attempting to communicate. CR 33.

II. The "Bubble" Ordinance

In the fall of 1993, Planned Parenthood of Central and Northern Arizona, Inc. ("Planned Parenthood") pressed the Phoenix City Council for the enactment of the "Bubble" Ordinance. Planned Parenthood complained that its abortion facilities are "regularly the target of 'right to life' . . . demonstrators" that "persist . . . in trying to badger . . . patients to listen to them or to accept their graphic literature, even after the patient . . . stated a desire to be left alone. . . ." "In response" to Planned Parenthood's demands, "the Phoenix City Council passed the Ordinance that is the subject of this litigation." At the Phoenix City Council Session held in connection with the enactment of the Ordinance, the only issue raised by proponents of the Ordinance was the allegedly offensive and emotionally unsettling anti-abortion

speech occurring on the public streets and sidewalks near abortion facilities. CR 13.

On November 17, 1993, the City of Phoenix enacted the "Bubble" Ordinance, codified as section 23-10.1 of the City Code. The restriction applies to speech deemed "demonstration activity," which is undefined but includes all "protesting, picketing, distributing literature" and all "education and counseling activities" on any topic. The Ordinance requires any person engaging in "demonstration activity" to withdraw to eight feet away from the person who orders it, or to discontinue the expression. The required separation of eight feet is measured from the end of any "outstretched arm" or "artificial extension" held by either person. The Ordinance operates on all public ways, including sidewalks, within 100 feet of a defined "health care facility." "Health care facility" is *not* limited to traditional medical facilities such as hospitals or medical clinics. It includes nonmedical facilities, such as any business, factory, or school, where one person (e.g., a nurse or counselor) uses the "place" "to provide" "medical, psychological, nursing, or other health care services, including family planning counseling and pregnancy-related services." App. 57a-58a.

III. The Decisions Below

On November 23, 1993, five days after Phoenix enacted the "Bubble" Ordinance, Petitioners filed this civil rights action under 42 U.S.C. § 1983 alleging that the Ordinance was facially unconstitutional. Petitioners requested a declaratory judgment, and preliminary and permanent injunctive relief. Petitioners also applied for a Temporary Restraining Order, which the District Court granted. Pursuant to the stipulation of the parties, the TRO remained in effect pending a determination of the Petitioners' application for a preliminary injunction and declaratory relief. On February 11, 1994, the District Court issued an order entitled

"Judgment in a Civil Case" and a "Memorandum of Decision and Order" declaring the Ordinance unconstitutional and granting a preliminary injunction. *Sabelko v. City of Phoenix*, 846 F.Supp. 810 (D. Ariz. 1994). App. 54a; App. 22a.

The District Court held the "Bubble" Ordinance unconstitutional under the First Amendment on numerous grounds.

First, the Court held the Ordinance impermissibly content-based. "[T]he legislative history of the Ordinance demonstrates, without qualification, that the Ordinance was enacted in direct response to 'anti-abortion' speech outside medical clinics." App. 34a. Further, the Ordinance "targets 'protest' communications," while leaving nonprotest expression unrestricted. In addition, the restrictions on speech turn on the basis of "[l]isteners reaction to [the] speech." App. 35a.

The District Court next held that the Ordinance was unconstitutionally overbroad. While its "annunciated intent" was to "prevent impeded access to health care facilities," the Ordinance restricts "passive leafletting and handbilling," "the display of signs . . . and even the mere voicing of statements which are of an educational, counseling, or protesting nature." App. 38a. Moreover, the Ordinance empowers individuals with unfettered and standardless authority, enforced by the City, to restrict expression. App. 40a-41a.

The District Court then held the Ordinance unconstitutionally vague. The lawfulness of speech impermissibly turns on the reactions of others. A speaker cannot know, with constitutional certainty, what speech will be deemed "demonstration" speech. App. 43a.

Last, the District Court held that by effectively banning hand-to-hand leafletting, the Ordinance failed to provide alternative channels of communication. App. 45a-46a.

On October 19, 1995, a panel of the Ninth Circuit, in a divided decision (2-1), reversed the District Court and held that the "Bubble" Ordinance passed constitutional muster. *Sabelko v. City of Phoenix*, 68 F.3d 1169 (9th Cir. 1995). App. 1a. The majority held that the Ordinance was content-neutral because, like the "36-foot 'buffer zone'" injunction in *Madsen*, the restriction "makes no reference to the content of the speech it purports to regulate." App. 6a. The Court ruled that the Ordinance is "'narrowly tailored to serve a significant governmental interest, and leaves open ample alternative channels of communication'." App. 7a. The Court explicitly held that "persons approaching a health care facility represent a 'captive audience'" and that the "public area adjacent to a health care facility" may not be "considered, for all purposes, an open forum." App. 8a. The Court rejected the fear that clinic "escorts or others . . . may create a [no speech] zone . . . larger than the eight feet contemplated by the Ordinance." The Court also reasoned that allowing "'any person'," such as a clinic "escort" or other third person, to silence a demonstrator serves to preserve the privacy interests of the patient. App. 8a-9a. The majority purported to distinguish the similar "consent" provision struck down in *Madsen*, reasoning that, by contrast, the "Bubble" Ordinance "permits any approach to any individual until the individual requests a disengagement." App. 9a-10a.

In a strong dissenting opinion, Judge Beezer argued that the Ordinance was unconstitutional "[b]ecause . . . [i]t is not narrowly drawn and overly burdens protected speech." App. 12a. He reasoned that while the government has an interest in preserving unimpeded patient access to medical clinics, the Ordinance places a "'substantial . . . burden on speech [that] does not serve to

advance its goals'." App. 16a. He argued that "[a]nybody in the area of the facility," including nonpatients, "are free to effectively silence any speech they find objectionable by invoking the 'bubble'." Thus, "peaceful communicator[s] . . . are chilled." App. 16a. He also argued that the Ordinance can be used to prevent leafletting or handbilling on sidewalks by means of "escorts" approaching leafletters and invoking the "bubble" wherever the leafletter goes within "the 100-foot buffer zone." Thus, "[s]trategic use of the 'bubble' could eviscerate" handbilling and leafletting. App. 17a. He stressed that "[a] number of people acting in concert can . . . effectively prevent all peaceful communication [turning] [the] entire 100-foot buffer zone into a no speech zone." App. 17a. He argued that, unlike the federal Freedom of Access to Clinic Entrances Act of 1994 ("FACE"), 18 U.S.C. § 248, the "ordinance broadly sweeps at peaceful communication that lies at the core of the First Amendment." App. 17a-18a. Last, he pointed out that "*Madsen*'s [unconstitutional] consent provision is functionally indistinguishable from" the "Bubble" Ordinance. "In *Madsen*, all uninvited approaches were barred; here, all unwanted approaches are barred. The effect is the same; more speech than necessary is effectively silenced." App. 18a-19a.

IV. Pending Related Cases

On March 14, 1995, in a related case, *Edwards v. City of Santa Barbara*, 883 F.Supp. 1379 (C.D. Cal. 1995), the United States District Court for the Central District of California held an identical Santa Barbara "Bubble" Ordinance provision to be unconstitutional for reasons similar to those expressed by Judge Beezer. App. 82a-89a. On November 22, 1995, subsequent to the Ninth Circuit's decision in the case at bar, the Ninth Circuit vacated the *Edwards* decision and remanded that case back to the

District Court in light of its *Sabelko* opinion. App. 97a. *Edwards* is now in the District Court for further proceedings.

This Court has pending for determination a Petition for Certiorari in *Schenck v. Pro-Choice Network of Western New York, et al.*, 64 USLW 3486 (Dec. 27, 1995) (No. 95-1065), involving a similar "bubble" provision. In *Schenck*, a divided en banc Second Circuit upheld a similar "bubble" provision contained in an injunction.

REASONS FOR GRANTING THE WRIT

The decision of the court below works a revolution in First Amendment jurisprudence. First, the Ninth Circuit approved an "audience veto" restriction on speech in a public forum, contrary to many cases condemning the "heckler's veto." Second, the Ninth Circuit explicitly expanded the "captive audience" doctrine into the public forum, jettisoning prior limitation on that narrow exception to the First Amendment.

En route to its decision, the court below ran into a head-on conflict with this Court's decision in *Madsen v. Women's Health Center*, invalidating a substantially similar "audience consent" provision. 114 S.Ct. at 2529. The Ninth Circuit's decision also conflicts directly with the Eighth Circuit's decision in *United Food and Commercial Workers Int'l Union v. IBP*, 857 F.2d 422 (8th Cir. 1988), which held unconstitutional a statute that made it a crime to persist in communicating with another person about employment when the listener requested the speaker to desist. The Ninth Circuit's decision also directly conflicts with the decision of the Supreme Court of North Dakota in *Fargo Women's Health Organization, Inc. v. Lambs of Christ*, 488 N.W.2d 401 (N.D. 1992), striking down an injunction provision containing a

restriction substantially identical to the Phoenix "Bubble" Ordinance.

The Phoenix "Bubble" Ordinance restricts peaceful and nonthreatening expression of all persons, including persons who have never harassed anyone or engaged in any misconduct, in all public fora near places used for any sort of medically related counseling or nursing. Most significantly, unlike a site-specific injunction that narrowly restricts only the conduct of particular troublemakers, this restriction on speech is codified as a law of general applicability, limiting the expressive rights of all persons. This draconian ordinance is absolutely without precedent.

The decision below approves an ordinance which creates 100-foot zones within which abortion facilities can ban all unwanted speech. Abortion clinic "escorts" need only "shadow" leafletters, continuously invoking the "bubble."[1] Furthermore, the Ordinance may be used to ban unwanted speech within 100 feet of *any* business, factory, school, or other place where a single nurse or counselor is brought in and "provides" some health related service on the premises. This is in direct conflict with this Court's repeated admonitions against total bans on expression in a public forum. *Madsen*, 114 S.Ct. at 2527; *Frisby v. Schultz*, 487 U.S. 474, 486 (1988); *Board of Airport Commissioners v. Jews for Jesus, Inc.*, 482 U.S. 569, 575 (1987); *United States v. Grace*, 461 U.S. 171, 181 (1983).

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[1]Indeed, at the hearing on the motion for preliminary injunction, the City's counsel agreed with Petitioners' attorney that under the Ordinance, clinic employees or volunteers could invoke the "bubble" even if the patients they were escorting affirmatively indicated that they wanted to talk to the sidewalk counselor or receive pro-life literature. CR 29.

The "Bubble" Ordinance essentially creates an "audience veto." The Ninth Circuit's decision, therefore, directly conflicts with numerous decisions of this Court holding that statutes restricting speech on the basis of listener reaction or the communicative impact of speech are unconstitutional content-based restrictions. *Forsyth County, Ga. v. Nationalist Movement*, 505 U.S. 123, 134 (1992); *United States v. Eichman*, 496 U.S. 310, 317-18 (1990); *Texas v. Johnson*, 491 U.S. 397, 411-12 (1987); *Boos v. Barry*, 485 U.S. 312, 321 (1988).

The decision below also conflicts with the vagueness doctrine this Court has recognized under the First Amendment. Where the lawfulness of speech turns on the reactions of others, the restriction is unconstitutionally vague. *Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971); also see *Johnson*, 491 U.S. at 407-410. Also, because persons cannot know with any degree of reasonable certainty what speech will be deemed "protest," "education," or "counseling," speakers, such as Petitioners, are forced to censor their speech out of fear of prosecution. *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972); *Riley v. National Fed'n of the Blind of North Carolina, Inc.*, 487 U.S. 781, 801 (1988); *Connally v. General Const. Co.*, 269 U.S. 385, 391 (1926).

The issues this case presents have profound national significance well beyond the interests of the two Petitioners. While claiming only to serve its interest in preserving unimpeded access to health care facilities, Phoenix has restricted nonthreatening and peaceful expression that does not impede or interfere with access. Most significantly, dozens of other cities have already begun to enact copycat "bubble" ordinances. For example, at least 35 California cities have "enacted or would like to enact ordinances

similar" to the Phoenix "Bubble" Ordinance.[2] The Ninth Circuit's decision validating this unprecedented municipal restriction of free speech rights has far-reaching and transcendent implications.

I. THE DECISION OF THE NINTH CIRCUIT DIRECTLY CONFLICTS WITH THIS COURT'S DECISION IN *MADSEN v. WOMEN'S HEALTH CENTER.*

In *Madsen v. Women's Health Center*, this Court struck down a substantially similar "audience veto" or "consent" provision. In *Madsen*, an injunction prohibited named demonstrators from "approaching any person seeking the services of the Clinic unless such person indicates a desire to communicate." 114 S.Ct. at 2529. While recognizing that protecting patients from being "stalked" or "shadowed" was a legitimate goal, this Court had little difficulty invalidating the provision, concluding that "[t]he 'consent' requirement alone invalidates the provision; it burdens more speech than necessary to prevent intimidation and to ensure access to the clinic." *Id.* at 2529.

The Phoenix "Bubble" Ordinance is constitutionally indistinguishable and suffers from the same deficiency. As Judge Beezer stated below, in dissent:

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[2]E.g., see *Edwards v. City of Santa Barbara*, 883 F.Supp. 1379 (C.D. Cal. 1995) (Santa Barbara's "bubble" ordinance). App. 60a-61a. Thirty-four different California cities appeared jointly as amici curiae in the case at bar. They stated below: "Amici are thirty-four cities throughout the State of California who have enacted or would like to enact ordinances similar to the ordinance adopted by the City of Phoenix, Arizona, at issue in this case." App. 98a-99a.

> *Madsen*'s consent provision is functionally indistinguishable from the one at issue here. In *Madsen*, all *uninvited* approaches were barred; here, all *unwanted* approaches are barred. The effect is the same; more speech than necessary is effectively silenced.

Sabelko, 68 F.3d at 1177 (Beezer, J., dissenting) (emphasis added) (App. 19a). Like the *Madsen* "consent" provision, the Phoenix "bubble" prohibits approaches, "regardless of how peaceful the contact may be." *Madsen*, 114 S.Ct. at 2529. "Absent evidence that the protestors' speech is independently proscribable (i.e., 'fighting words' or threats), or is so infused with violence as to be indistinguishable from a threat of physical harm, . . . this provision cannot stand." *Id.*

The Phoenix "bubble" does operate in a somewhat different manner than the provision invalidated in *Madsen*. However, nothing in the *Madsen* decision suggests that this distinction has constitutional significance. Both restrictions subject the would-be speaker to an "audience veto." Both provisions restrict speech, no matter how nonthreatening and peaceful, simply because the intended audience, or even a passerby, wishes to restrict it. Although the First Amendment does not guarantee to every speaker willing listeners, it does protect the "opportunity to win their attention." *Kovacs v. Cooper*, 336 U.S. 77, 87 (1949). The First Amendment protects the right to engage in expression even though directed at unfriendly or unsympathetic audiences. *Eichman*, 496 U.S. at 318-19; *Johnson*, 491 U.S. at 414. And see *Boos*, 485 U.S. at 323. "As a general matter, we have indicated that in public debate our own citizens must tolerate insulting, and even outrageous, speech in order to provide adequate breathing space to the freedoms protected by the First Amendment." *Madsen*, 114 S.Ct. at 2529 (quoting *Boos v. Barry*, 485 U.S. at 322).

As noted above, the Ordinance even goes beyond the unconstitutional "consent" provision in *Madsen*. It restricts expression at places having nothing at all to do with the delivery of medical care. The definition of "health care facility" is so broad that any "place" -- e.g., a shipyard or large plant -- can have one "nurse" or "counselor" on premises during a labor strike and thereby trigger the restrictions on unwanted speech within 100 feet of the company's "premises." Similarly, where a defined "health care facility" is located within an office building with other tenants, the Ordinance will operate to restrict expression on public issues having nothing at all to do with health services or abortion within 100 feet of the building.

Further, as Judge Beezer stressed in his dissent below, the Ordinance permits the creation of a 100-foot ban on all unwanted speech. Abortion facility "escorts" can simply shadow pro-life leafletters, such as Petitioners, and invoke the "bubble" as the leafletter approaches potential recipients. Worse yet, a clinic employee could approach a demonstrator doing no more than peacefully holding an anti-abortion sign, and with a series of commands to withdraw, back the demonstrator outside the 100 foot perimeter.

The Ninth Circuit hinged its holding on the portion of *Madsen* in which this Court upheld a limited 36-foot buffer zone. *Madsen*, 114 S.Ct. at 2527. In doing so, the divided panel mixed apples with onions and effectively turned *Madsen* on its head. The Phoenix "Bubble" Ordinance is plainly closer in substance to the "consent" provision which *Madsen* overturned, than to the "buffer zone" which *Madsen* upheld in part. Furthermore, the Ninth Circuit's decision completely ignores the critical basis for the injunction in *Madsen*. This Court explained in *Madsen* that "the state court imposed restrictions on petitioners . . . *because* they repeatedly violated the court's original order." *Id.* at 2524

(emphasis added). The Court emphasized "the fact that the state court originally issued a much narrower injunction, providing no buffer, [but] this order did not succeed in protecting access to the clinic." *Id.* at 2527. Repeated lawbreaking and violations of the narrower order by the defendants in *Madsen* convinced this Court to uphold the injunction against the defendants. Here, unlike the lawbreakers in *Madsen*, it is undisputed that Petitioners and many others have *never* engaged in any misconduct or disorder at an abortion facility. Furthermore, as an ordinance of general applicability, the Phoenix "Bubble" Ordinance restricts *everyone*, not just particular troublemakers.

II. THE DECISION BELOW CREATES AN UNPRECEDENTED EXPANSION OF THE "CAPTIVE AUDIENCE" EXCEPTION TO FREE SPEECH BY APPLYING THAT EXCEPTION TO AN AUDIENCE USING A PUBLIC FORUM.

The court below declared that "persons approaching a health care facility represent a 'captive audience'" and that, therefore, public sidewalks adjacent to such a facility need not be "considered, for all purposes, an open forum." App. 8a. This holding guts the First Amendment and flies in the face of this Court's "captive audience" decisions.

This Court has upheld restrictions on speech in a handful of cases where an unwilling listener would be unable to escape from the speech. Examples of "captive audiences" include the resident trapped in his home, *Frisby v. Schultz*, 487 U.S. 474; listeners unable to escape sound trucks broadcasting "in a loud and raucous manner," *Kovacs v. Cooper*, 336 U.S. 77; and riders on public transportation, *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974).

No case has ever held that persons were "captive audiences" because of a momentary encounter with speech in a public forum. On the contrary, each of the above cases, as well as many others, explicitly distinguish the "captive audience" situation from that of a person in a public place making momentary contact with speakers. See, e.g., *Kovacs*, 336 U.S. at 86-87 ("The unwilling listener is not like the passerby who may be offered a pamphlet in the street but cannot be made to take it"); *Lehman*, 418 U.S. at 303 ("Here we have no open spaces, no meeting hall, park, street corner, or public thoroughfare"); *Frisby*, 487 U.S. at 484 ("Although in many locations, we expect individuals simply to avoid speech they do not want to hear [citations omitted], the home is different").

In short, in public places, the burden is on the unwilling listener or viewer to "avoid further bombardment of their sensibilities simply by averting their eyes." *Cohen v. California*, 403 U.S. 15, 21 (1971). In the case at hand, this avoidance would take the form of simply walking past the picketers and counselors and into the building.

The Ninth Circuit claims to find support in *Madsen* for its novel and dramatic expansion of the "captive audience" doctrine. In so doing, the court below badly misread this Court's *Madsen* decision. *Madsen* upheld an injunctive restriction on noise audible to patients "*inside* the [abortion] clinic," where doctors and patients are presumably "captives" similar to the occupant of a home. *Madsen*, 114 S.Ct. at 2526, 2528. *Madsen*, however, never applied the "captive audience" doctrine to the public sidewalks outside. See *Pro-Choice Network of Western New York v. Schenck*, 67 F.3d 377, 406 n.5 (2nd Cir. 1995) (en banc) (Meskill, J., dissenting):

> The *Madsen* Court simply recognized that women *in* the clinic were "held 'captive' by medical circumstance," *Madsen*, 114 S. Ct. at 2526, thus supporting some of the injunction's restrictions, for example, those on banning loud noise levels or prohibiting the use of sound amplification equipment. This, however, does not mean that the women *approaching* the clinic are captive, and nothing in *Madsen* can be read as so holding.

People approaching an abortion facility, therefore, cannot be deemed a "captive audience" anymore than could people approaching any place of employment, any government building, any courthouse, any school, any airport or bus terminal -- in short, virtually any place one "has to" go. The Ninth Circuit's rationale is a formula for revoking the First Amendment.

III. THE DECISION OF THE NINTH CIRCUIT DIRECTLY CONFLICTS WITH A DECISION OF THE EIGHTH CIRCUIT.

The Ninth Circuit's decision upholding the "Bubble" Ordinance squarely conflicts with the Eighth Circuit's decision in *United Food and Commercial Worker's Int'l Union v. IBP*, 857 F.2d 422 (8th Cir. 1988), holding that statutory restrictions on unwanted labor speech are unconstitutional. The *IBP* case involved a Nebraska statute that, in relevant part, made it unlawful to "persist[] in talking to or communicating in any manner with [another] person or members of the person's family against their will" about matters related to employment. *Id.* at 432. In words equally applicable to the Phoenix Ordinance, the Eighth Circuit stated: "That the speech is unwelcome does not deprive it of protection." *Id.* (citing *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 910 (1982); *Cohen*, 403 U.S. at 26; *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971)).

Under the Phoenix "Bubble" Ordinance, any business, company, or factory -- having no other connection with the delivery of general health care services -- can have a single "nurse" or "counselor" on its premises and thereby invoke the Ordinance's speech restrictions on all public property within 100 feet of the premises. For instance, in a labor dispute, a company or factory can, under the Ordinance, trigger the restriction on labor speech by means of bringing a "nurse" or "counselor" on the premises ostensibly to "provide" some sort of "health care service" or "counseling." In short, the "Bubble" Ordinance -- and the decision sustaining it -- cannot be reconciled with *IBP*.

IV. THE DECISION OF THE NINTH CIRCUIT CONFLICTS WITH A DECISION OF THE NORTH DAKOTA SUPREME COURT.

In addition to the *IBP* decision of the Eighth Circuit, the Ninth Circuit's decision also directly conflicts with the North Dakota Supreme Court's decision in *Fargo Women's Health Organization, Inc. v. Lambs of Christ*, 488 N.W.2d 401 (N.D. 1992). *Lambs of Christ* involved an injunction against anti-abortion demonstrators that, *inter alia*, prohibited them from "speaking to staff and patients . . . who indicate that they do not wish to be spoken to" and from "'distributing leaflets or brochures to any person who has indicated orally or by gesture that such person does not wish to receive such literature'." *Id.* at 407 n.1. The court invalidated these restrictions, stressing the constitutionally protected nature of speaking and leafletting, and holding that other measures were available to ensure "protection from those protestors who physically force literature on passers-by." *Id.* at 411. This analysis is equally applicable to the Phoenix "Bubble" Ordinance.

V. IF ALLOWED TO STAND, THE DECISION BELOW PRESENTS THE PROSPECT OF OTHER SELECTIVE "BUBBLE" ORDINANCES.

The undisputed selectivity of the City of Phoenix in protecting the interests of Phoenix abortion facilities from unwanted expression presents the glaring prospect of other selective "bubble" ordinances being enacted at the behest of others upset by demonstrations at their places of business. For instance, in response to animal rights demonstrators earnestly engaging potential purchasers of fur coats, a municipality, at the insistence of furriers and department store owners, might impose a "bubble" ordinance aimed at demonstrations in front of clothing stores. Similarly, during an acrimonious lettuce boycott in which there has been documentation of some instances of shoppers being verbally accosted by farm workers, the city might, at the urging of the lettuce growers and operators of supermarkets, impose a "bubble" ordinance applicable only to demonstrations at grocery stores. Or the federal government might impose a "bubble" applicable to the areas abutting recruiting centers to protect potential military recruits from being "harassed" by anti-military protestors.

A truly general law that requires demonstrators to withdraw upon request would obviously be unconstitutional. But specialized legislation designed to protect only certain persons or businesses from face-to-face confrontations with demonstrators, while other less influential people similarly vexed by zealous demonstrators are forced to rely on general criminal laws, raises core First Amendment concerns. "For it is a central tenet of the First Amendment that the government must remain neutral in the marketplace of ideas." *Hustler Magazine v. Falwell*, 485 U.S. 46, 56 (1988). This equality principle is so basic that this Court has ruled that it extends even to the regulation of expression not protected by the First Amendment. See *R.A.V. v. City of St. Paul, Minnesota*, 505 U.S. 377, 391-94 (1992).

In *Madsen*, this Court explained that injunctions "carry greater risks of censorship and discriminatory application than do general ordinances." See *Madsen*, 114 S.Ct. at 2524. But an ordinance limited to protecting certain industries -- such as abortion businesses -- raises the same spectre of discrimination. Such an ordinance, moreover, does not even enjoy the advantage of limiting itself -- like an injunction -- to particular, proven malefactors. The Phoenix "Bubble" Ordinance thus partakes of the worst of both worlds. For while any business plagued by disruptive demonstrations is eligible for an injunction, only politically influential interests will be able to obtain specialized legislation.

CONCLUSION

The First Amendment has no value if it protects only welcome speech. The Ninth Circuit has nevertheless upheld an ordinance imposing an "audience veto" in a public forum. The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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March 4, 1996

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 94-15495

KATHERINE SABELKO and NANCY BARTO,

Plaintiffs-Appellees,

v.

THE CITY OF PHOENIX, SKIP RIMSZA,*2 in his official capacity as Mayor of the City of Phoenix, and THELDA WILLIAMS, FRANCES EMMA BARWOOD, CRAIG TRIBKEN, JOHN NELSON, KATHY DUBS, SALOMON F. LEIJA, and CALVIN C. GOODE, in their official capacity as members of the City of Phoenix City Council,

Defendants-Appellants.

OPINION

October 19, 1995

Before: SCHROEDER, BEEZER, and THOMPSON, Circuit Judges.

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*Skip Rimsza, current Mayor of Phoenix, is substituted for former Mayor Paul Johnson.

SCHROEDER, Circuit Judge:

In response to rising protest around abortion clinics in Phoenix, Arizona, the City Council in November of 1993 passed an ordinance regulating the conduct of demonstrators in public areas within 100 feet of health care facilities. Known as the Phoenix "bubble" ordinance, the law makes illegal a demonstrator's failure to honor a person's "clearly communicated request" to withdraw to a distance of eight feet from the person if the demonstrator is in a public area within 100 feet of a health care facility.[1]

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[1]The ordinance provides:

ORDINANCE NO. G3705

AN ORDINANCE AMENDING CHAPTER 23, ARTICLE 1 OF THE PHOENIX CITY CODE, BY ADDING SECTION 23-10.1, RELATING TO UNIMPEDED ACCESS TO HEALTH CARE FACILITIES; AND DECLARING AN EMERGENCY.

WHEREAS, unimpeded access to health care services is critically and uniquely important to the public health, safety and welfare; and

WHEREAS, persons attempting to access health care facilities are subject to harassing or intimidating activity tending to impede their access to those facilities by demonstrators approaching within extremely close proximity; and

WHEREAS, such activity near health care facilities creates a "captive audience" situation where persons seeking services cannot avoid the area outside the facilities, and their physical and emotional conditions may make them especially vulnerable to the

(continued...)

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[1](...continued)
adverse physiological and emotional effects of such harassing or intimidating activities directed at them from extremely close proximity; and

WHEREAS, such activity in extremely close proximity tends to undermine a person's right to privacy and interfere with a person's right to seek legitimate health care treatment and counseling; and

WHEREAS, this ordinance does not preclude all protesting, picketing, demonstrating, leafleting or educational activities near a health care facility but is a necessary time, place and manner restriction intended to reconcile and protect the First Amendment rights of demonstrators and the rights of persons using health care facilities to be free from direct confrontation, hindrance, harassment, intimidation and harm; and

WHEREAS, existing law does not adequately protect such access to health care facilities; NOW THEREFORE,

BE IT ORDAINED by the Council of the City of Phoenix as follows:

SECTION 1. Chapter 23, Article 1, Phoenix City Code, is amended by adding section 23-10.1 to read:

Sec. 23-10.1 IMPEDING ACCESS TO HEALTH CARE FACILITIES.

A. It is unlawful for any person, in the course of demonstration activity within the access area of a health care facility, to fail to withdraw upon a clearly communicated request to do so to a distance of at least eight (8) feet away from any person who has made the request.

B. For purposes of this section:

1. "Access area" means any portion of a public street or other public place or any place open to the public within one hundred (100) feet of an exterior wall or entryway of a health care facility.

Six days after Phoenix enacted the ordinance, plaintiffs Katherine Sabelko and Nancy Barto filed suit in federal court pursuant to 42 U.S.C. § 1983 seeking declaratory and injunctive relief against the City on the ground that the ordinance violated their First Amendment rights. The plaintiffs describe themselves as antiabortion sidewalk counselors who distribute literature in front of Phoenix clinics and attempt to engage others in peaceful conversation about alternatives to abortion.

The district court granted the injunction and the city now appeals. Appearing amici curiae in this action in support of the City are Planned Parenthood of Central and Northern Arizona, Inc. and the City of San Jose writing on behalf of 32 other California cities. In support of the plaintiffs-appellees is amicus Arizona Civil Liberties Union (AzCLU).

The District Court Decision

The district court's preliminary injunction preventing enforcement of the ordinance rested upon no disputed issues of fact. The district court ruled as a matter of law that the ordinance violates the First Amendment, and all issues on appeal to this court are presented for our de novo review.

The district court ruled the ordinance unconstitutional on four principal grounds which we summarize as follows:

1. Because the ordinance regulates "protest," but not supportive speech, and because it gives private citizens the

authority to silence speech, the district court ruled that it was viewpoint discriminatory.[2]

2. The court ruled the ordinance overbroad because, in the district court's view, it effectively bans handbilling within the 100-foot area.

3. Ruling the ordinance vague, the district court found insufficiently clear meaning in the phrases "clearly communicated request" to withdraw and "demonstration activity."

4. Finally, the district court rejected any analogy between the privacy interest infringed by demonstration activity targeting a home, as recognized in *Frisby v. Schultz*, 487 U.S. 474 (1988), and that affected by activity targeting a health care facility. The district court held that the principles applicable to free speech in a public forum as enunciated in *Perry Education Ass'n. v. Perry Local Educators' Ass'n.*, 460 U.S. 37, 45 (1983), control demonstration activity outside health care facilities.

The Madsen Decision

The district court's injunction was entered on February 11, 1994. The Supreme Court's subsequent decision in *Madsen v. Women's Health Center, Inc.*, 114 S.Ct. 2516 (1994), guides our review and controls our opinion today.

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[2]The plain terms of the ordinance contradict the district court's assertion that it restricts only certain kinds of speech. The ordinance does not limit its reach to "oral protest, education [and] counseling;" it merely lists them among the activities it regulates under the rubric of "demonstration activity," and it states explicitly that "[f]or purposes of this section . . . demonstration activity . . . *is not limited to*" these activities.

In *Madsen*, the Supreme Court considered the validity under the First Amendment of a Florida state court injunction against named individual antiabortion protesters and persons acting in concert with them. The Court upheld the establishment of a 36-foot "buffer zone" around an abortion clinic in Melbourne, Florida. Within the buffer zone, the defendants were prohibited from demonstration activity of virtually any kind. The Supreme Court ruled that the injunction was content neutral despite the fact that it targeted only abortion protesters.

We can find no basis for holding the Phoenix ordinance less content neutral than the Florida injunction. That injunction prohibited the defendants from "congregating, picketing, patrolling, demonstrating or entering" within 36 feet of the clinic. Quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989), the Court held that the "principal inquiry in determining content neutrality is whether the government has adopted a regulation of speech 'without reference to the content of the regulated speech.' " *Madsen* 114 S.Ct. at 2523. The Florida injunction passed this test, the Supreme Court said, because "none of the restrictions . . . were directed to the contents of th[e] petitioner's message." *Id.* The Phoenix ordinance, like the Florida injunction, makes no reference to the content of the speech it purports to regulate. The Supreme Court's ruling in *Madsen* thus forecloses the plaintiffs' contention that the Phoenix ordinance is viewpoint based.[3]

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[3]Plaintiffs' contention that the ordinance improperly vests discretion in private citizens to curtail speech is likewise insupportable. The cases they cite are concerned only with discretion vested in agents of the government. Like the Colorado Court of Appeals, which recently considered an even stricter ordinance, we know of no authority "that would extend this doctrine to limit the right of a private citizen to determine whether

(continued...)

In *Madsen*, the Court announced that an injunction is subject to more rigorous scrutiny than is a generally applicable ordinance. To survive appellate review, the injunction must burden "no more speech than necessary to serve a significant government interest." *Madsen*, 114 S.Ct. at 2525 (citing *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 916 (1982)). The Court explained that the standard is more lenient in cases such as this where we review an ordinance of general applicability. *See Madsen* 114 S.Ct. at 2524-25. In contrast to an injunction, a content neutral, time, place and manner restriction in an ordinance survives First Amendment scrutiny if it is "narrowly tailored to serve a significant governmental interest, and leave[s] open ample alternative channels of communication." *Perry*, 460 U.S. at 45 (citations omitted). The dissent urges a more stringent standard for an ordinance than an injunction. In *Madsen*, Justice Stevens propounded the same view but the majority expressly rejected it. *Madsen* 114 S.Ct. at 2525. We are bound by the majority.

The Court held in *Madsen* that the injunction survived scrutiny under the more rigorous standard because it burdened no more speech than necessary to serve significant government interests. The Court focused on several such interests that the Phoenix ordinance likewise serves. These include a woman's right to abortion and other pregnancy-related treatment, see *Roe v. Wade*, 410 U.S. 113 (1973), as well as the state's interest in public safety and order, including street and sidewalk traffic control, *see Madsen*, 114 S.Ct. at 2526. The *Madsen* Court agreed with the

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[3](...continued)
to permit others to confront [her] concerning medical . . . treatment." *Hill v. City of Lakewood*, No. 94CA0856, 1995 WL 411983, *4 (Colo.App.) (upholding ordinance forbidding uninvited approaches to within eight feet of a person less than 100 feet away from entrance to a health care facility).

Florida Supreme Court that "the state's strong interest in residential privacy, acknowledged in *Frisby v. Schultz*, 487 U.S. 474 (1988), applied by analogy to medical privacy," *Madsen* 114 S.Ct. at 2526. The Court approved the Florida court's view that just as targeted picketing of the home threatens the psychological well-being of a "captive" resident, targeted picketing of a hospital or clinic threatens the physical and psychological well-being of a patient held "captive" by medical circumstance. See *id.* (citing *Operation Rescue v. Women's Health Center, Inc.*, 626 So.2d 664, 673 (Fla. 1993)).

The Supreme Court's decision in *Madsen* thus undermines the pillars supporting the district court's ruling that the ordinance is unconstitutional. Under the standard announced in *Madsen*, the ordinance is not viewpoint discriminatory, but is content neutral. It is a time, place and manner restriction that serves several significant state interests. Under *Madsen*, it is not violative of the First Amendment if it is narrowly tailored to serve those interests and leaves open ample alternative means of communication. *See Perry*, 460 U.S. at 45. The provisions of the ordinance challenged in this case are no more vague than those of the injunction in *Madsen*. Finally, the Supreme Court in *Madsen* expressly recognized that persons approaching a health care facility represent a "captive audience," thus rejecting the position of the district court in this case that a public area adjacent to a health care facility must be considered, for all purposes, an open forum.

Appellees' principal contention on appeal is that the ordinance is overbroad and not sufficiently narrowly tailored. They contend that by permitting "any person" to ward off a demonstrator, the ordinance curtails too much speech. They argue that to survive scrutiny, the ordinance must permit only patients seeking health care services to terminate unwanted confrontations and face-to-face communication.

The problem the city faces is that such narrowing would compromise the very privacy interests the ordinance was meant to protect. The approach appellees suggest would require a woman to identify herself as a patient seeking pregnancy-related services in order to terminate an unwanted confrontation. Moreover, by preventing the parent or partner of a young or sick patient from invoking protection on her behalf, the narrowing that appellees advocate would tend to leave exposed to the most persistent demonstrators those least capable of declining to receive their message.

The appellees, amicus AzCLU and the dissent express concern about the possibility that under this ordinance, escorts or others who may have no relationship whatever to the patients may create a zone around a patient even larger than the eight feet contemplated by the ordinance. They suggest, for example, that an escort might repeatedly invoke the "bubble" while advancing toward a counselor beyond eight feet from the patient. The parties provide little basis for assessing how likely such a scenario may be. We nevertheless observe that as the distance between the escort and the patient increases, so does the ability of other counselors to approach the patient. Appellees offer no alternative provision that would adequately protect the city's concerns and avoid the theoretical possibility that escorts might inflate the "bubble" zone the city contemplated.

In support of their overbreadth position, appellees and our dissenting colleague point us to another portion of the *Madsen* disposition which they incorrectly assert is dispositive of the issues before us. The Court in *Madsen* struck down as overbroad a provision of the injunction that drew a line of 300 feet from the facility and barred "all uninvited approaches of persons seeking the services of the clinic regardless of how peaceful the contact may be" within that area. *Madsen*, 114 S.Ct. at 2529. This injunctive ban the Supreme Court termed a "consent" requirement. The Court

held it burdened more speech than necessary to prevent intimidation and ensure access.

The ordinance in question here has no such bar against uninvited approaches. It permits any approach to any individual until the individual affirmatively requests a disengagement. Moreover, there is no limitation on approaches beyond a 100-foot line, whereas the *Madsen* line was 300 feet. Finally, once the "bubble" is invoked, communication is not prohibited or interrupted, but simply distanced to eight feet. For these reasons we hold that the ordinance is narrowly tailored to serve significant interests. For similar reasons, we conclude that it also allows ample alternative means of communication. Contrary to the claims of appellees and the dissent, there is no bar to signs, placards, or pictures. Counselors can handbill and approach anyone outside the 100-foot barrier, and anyone within the 100 feet until and unless that person objects. The First Amendment protects the right of a prospective recipient of a handbill to refuse the communication as well as the right of the prospective communicant to offer it. *Martin v. Struthers*, 319 U.S. 141 (1943); *Schneider v. State*, 308 U.S. 147 (1939).

The JUDGMENT OF THE DISTRICT COURT IS REVERSED AND THE MATTER REMANDED WITH INSTRUCTIONS TO VACATE THE INJUNCTION.

BEEZER, Circuit Judge, dissenting.

By voice, pamphlet or placard some citizens of the United States are actively engaged in a vigorous debate on the sidewalks, streets and other public places adjacent to health care facilities

located in cities and towns across the country. The debate is also heard in the nation's capitol.[1]

Unlike the Senators who are given a privilege on the floor of the Senate, the citizen demonstrators in this case claim a right to free speech protected by the First Amendment. So it is that I address the question whether speech incident to demonstration

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[1]Protected by the privilege of the Speech or Debate Clause, U.S. Const. art. I, § 6, the remarks of several Senators are reported in the Congressional Record, 141 Cong.Rec. S8862-63 (daily ed. June 22, 1995).

Mr. SMITH.

* * *

In illustration No. 4, the abortionist takes a pair of scissors and inserts the scissors into the back of the skull and then opens the scissors up to make a gap in the back of the skull in order to insert a catheter to literally suck the brains from the back of that child's head.

That is what happens in the so-called partial-birth abortion.

* * *

Ms. MOSELEY-BRAUN.

* * *

The extreme agenda, I think, is pretty evident. I have never seen anything as horrific, as horrendous, as awful, as ugly and graphic as the posters and the doll figure I saw on the floor a few minutes ago. It is outrageous to bring something like that on the floor of the U.S. Senate to make whatever point. Whether you are for or against choice, to bring that kind of graphic depiction of ugliness on this floor, I think, only serves the purpose of inflaming people around an issue that really inflames and divides the American people, and that does go to the heart of the opposition's extreme agenda here.

activity in the vicinity of health care facilities may be proscribed by city ordinance.

The City of Phoenix enacted Ordinance No. G3705 requiring any person engaged in demonstration activity within 100 feet of a health care facility to withdraw at least eight feet away from any person who requests it. Because I believe the ordinance is not narrowly tailored and overly burdens protected speech, I respectfully dissent.

I

In 1993, due to concerns about harassment outside health care facilities, the City of Phoenix enacted an ordinance limiting "demonstration activity" near such clinics. The ordinance in effect allowed individuals within 100 feet of all designated facilities to create a "bubble" around themselves. The ordinance requires all persons engaging in "demonstration activity" to withdraw a distance of eight feet when requested to do so. Specifically, the ordinance provides:

> ORDINANCE NO. G3705
> AN ORDINANCE AMENDING CHAPTER 23, ARTICLE 1 OF THE PHOENIX CITY CODE, BY ADDING SECTION 23-10.1, RELATING TO UNIMPEDED ACCESS TO HEALTH CARE FACILITIES; AND DECLARING AN EMERGENCY.
>
> WHEREAS, unimpeded access to health care services is critically and uniquely important to the public health, safety and welfare; and
>
> WHEREAS, persons attempting to access health care facilities are subject to harassing or intimidating activity tending to impede their access to those facilities by

demonstrators approaching within extremely close proximity; and

WHEREAS, such activity near health care facilities creates a "captive audience" situation where persons seeking services cannot avoid the area outside the facilities, and their physical and emotional conditions may make them especially vulnerable to the adverse physiological and emotional effects of such harassing or intimidating activities directed at them from extremely close proximity; and

WHEREAS, such activity in extremely close proximity tends to undermine a person's right to privacy and interference with a person's right to seek legitimate health care treatment and counseling; and

WHEREAS, this ordinance does not preclude all protesting, picketing, demonstrating, leafleting [sic] or educational activities near a health care facility but is a necessary time, place and manner restriction intended to reconcile and protect the First Amendment rights of demonstrators and the rights of persons using health care facilities to be free from direct confrontation, hindrance, harassment, intimidation and harm; and

WHEREAS, existing law does not adequately protect such access to health care facilities; NOW THEREFORE,

BE IT ORDAINED by the Council of the City of Phoenix as follows:

SECTION 1. Chapter 23, Article 1, Phoenix City Code, is amended by adding section 23-10.1 to read:

Sec. 23-10.1 IMPEDING ACCESS TO HEALTH CARE FACILITIES.

A. It is unlawful for any person, in the course of demonstration activity within the access area of a health care facility, to fail to withdraw upon a clearly communicated request to do so to a distance of at least eight (8) feet away from any person who has made the request.

B. For purposes of this section:

1. "Access area" means any portion of a public street or other public place or any place open to the public within one hundred (100) feet of an exterior wall or entryway of a health care facility.

2. "Demonstration activity" includes but is not limited to protesting, picketing, distributing literature, attempting to impede access, or engaging in oral protest, education or counseling activities.

3. "Health care facility" means any hospital, clinic, office, building or other place used to provide medical, psychological, nursing or other health care services, including family planning counseling and pregnancy- related services.

C. For purposes of this section, distance shall be measured from that part of the closest demonstrator's body that is nearest to the closest part of the requesting person's body. The term "body" includes any natural or

artificial extension of a person's body including but not limited to an outstretched arm or a hand-held sign.

SECTION 2. WHEREAS, the immediate operation of the provisions of this ordinance is necessary for the preservation of the public peace, health and safety, an EMERGENCY is hereby declared to exist, and this ordinance shall be in full force and effect from and after its passage by the Council as required by the City Charter and is hereby exempted from the referendum clause of said Charter.

PASSED by the Council of the City of Phoenix this 17th day of November, 1993.

Katherine Sabelko and Nancy Barto (collectively "Sabelko") are pro-life leafletters and "sidewalk counselors" who engage in activity outside abortion clinics in Phoenix. As sidewalk counselors they distribute literature and attempt to orally communicate the alternatives to abortion. After the passage of the ordinance, Sabelko curtailed her activities and speech because of fear of prosecution under the ordinance. Viewing the ordinance as an unconstitutional infringement of speech, Sabelko filed this action pursuant to 42 U.S.C. § 1983 seeking declaratory and injunctive relief. The district court granted the injunction and declared the ordinance unconstitutional. The City of Phoenix timely appealed.

II

The first step in any First Amendment inquiry is to determine whether the ordinance is content or viewpoint neutral. I agree with the court's opinion that the ordinance is content-neutral and I will not repeat that analysis. A content-neutral restriction on speech must be " 'narrowly tailored to serve a significant governmental interest, and . . . leave open ample alternative

channels for communication of the information.' " *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (quoting *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984)). Narrow tailoring requires that the means chosen do not "burden substantially more speech than is necessary to further the government's legitimate interests." *Id.* at 799. More precisely, "[a] statute is narrowly tailored if it targets and eliminates no more than the exact source of the 'evil' it sees to remedy." *Frisby v. Schultz*, 487 U.S. 474, 485 (1987).

It is undeniable that the City of Phoenix's interest in protecting access to health care facilities is substantial. The government "has a strong interest in protecting a woman's freedom to seek lawful medical or counseling services in connection with her pregnancy." *Madsen v. Women's Health Center, Inc.*, 114 S.Ct. 2516, 2526 (1994). On its face the ordinance appropriately seeks to protect the users of the facilities from "harassing or intimidating activity tending to impede . . . access to those facilities," and the "adverse physiological and emotional effects" of the harassment. Although the City of Phoenix's interests are sufficiently substantial to support an appropriately tailored ordinance, Ordinance No. G3705 lacks such tailoring.

It is a touchstone of First Amendment jurisprudence that "[g]overnment may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals." *Ward*, 491 U.S. at 799. The ordinance's consent provision does just that. Anybody in the area around the facility, whether they be a patient or otherwise, are free to effectively silence any speech they find objectionable by invoking the "bubble." The aims of the ordinance -- to allow access, eliminate harassment and prevent intimidating activity -- are served. But in so doing, the peaceful communicator expressing a protected viewpoint is also chilled.

Especially disturbing is the fact that the eight-foot bubble would prevent leafletting or handbilling. Once the bubble is invoked, it would be nearly impossible for any written communication to be distributed at any time. For example, an individual could immediately invoke the "bubble" once in the 100-foot buffer zone and prevent any handbilling on the sidewalks or streets that provide public access to the health care facility. Patient escorts acting in support of the facility could invoke the "bubble" preventing access to patients who may otherwise have at least glanced at the written materials before themselves invoking the "bubble." Although the First Amendment does not guarantee a willing listener or recipient, it does protect the "opportunity to win their attention." *Kovacs v. Cooper*, 336 U.S. 77, 87 (1948). Strategic use of the "bubbie" could eviscerate that opportunity.

Even more disturbing, the ordinance allows any person to invoke the "bubble." A number of people acting in concert can create a buffer around the facility exceeding eight feet and that would effectively prevent all peaceful communication. The entire 100-foot buffer zone could be turned into a no speech zone if a sufficient number of escorts occupied the zone and invoked the "bubble." The Supreme Court teaches that "[p]recision of regulation must be the touchstone" of any restriction on speech. The ordinance's broad sweep goes too far. *NAACP v. Button*, 371 U.S. 415, 438 (1963) (citations omitted).

The City of San Jose in its amicus curiae brief focuses our attention on the threatening and harassing activity that the ordinance is designed to prevent. Harassment, threats and physical obstruction of clinics has long been subject to injunctive relief and Congress has now made such behavior criminal. Congress, addressing such concerns, passed the Freedom of Access to Clinic Entrances Act of 1994 (hereinafter "FACE"), 18 U.S.C. § 248. The intentional use of force or physical obstruction to block clinic entrances is a crime. At least one circuit has concluded that FACE

does not impede peaceful protesting traditionally protected by the First Amendment. *See American Life League v. Reno*, 47 F.3d 642 (4th Cir.) (upholding FACE as a content-neutral, narrowly tailored restriction on protected speech), *cert. denied*, 63 U.S.L.W. 3834 (U.S. Oct. 2, 1995) (No. 94-1867). Unlike FACE, the Phoenix ordinance broadly sweeps at peaceful communication that lies at the core of the First Amendment.

III

I end my discussion with *Madsen*. In *Madsen*, the Supreme Court considered an injunction imposed by a Florida court to prevent protesters from impeding access to a clinic. Concluding that an injunction is subject to a more stringent level of scrutiny then a content-neutral, generally applicable statute, the Court examined "each contested provision of the injunction to see if it burdens more speech than necessary to accomplish its goal." 114 S.Ct. at 2526. The injunction contained a variety of provisions restricting expressive activity by protesters outside the clinic. The City of Phoenix relies heavily on *Madsen*'s conclusion that a 36-foot buffer zone established in the injunction burdened no more speech than necessary. The City of Phoenix argues that because the more burdensome 36-foot buffer zone was upheld under an even more stringent standard, Ordinance No. G3705 does not improperly infringe on speech. What the City fails to acknowledge is that the buffer zone was imposed in Madsen after the protesters continued to ignore court orders and impeded access to the clinic. *Id.* at 2524. After repeated failures to protect the entrance to the clinic, the state court was left with no choice but to enforce a broader injunction to protect the government interests at stake.

Also included in the *Madsen* injunction was a provision that prohibited protesters from "approaching any person seeking the services of the Clinic unless such person indicates a desire to

communicate." *Id.* at 2516. Despite recognizing that protecting patients from being "stalked" or "shadowed" was a legiimate goal, the Court had little difficulty invalidating the provision, concluding that "[t]he 'consent' requirement alone invalidates this provision; it burdens more speech than is necessary to prevent intimidation and to ensure access to the clinic." *Id.* at 2529. *Madsen*'s consent provision is functionally indistinguishable from the one at issue here. In *Madsen*, all uninvited approaches were barred; here, all unwanted approaches are barred. The effect is the same; more speech than necessary is effectively silenced.

As the Court has often stated, and recently repeated in Madsen, " '[a]s a general matter, we have indicated that in public debate our own citizens must tolerate insulting, and even outrageous, speech in order to provide adequate breathing space to the freedoms protected by the First Amendment.' " *Madsen*, 114 S.Ct. at 2529 (quoting *Boos v. Barry*, 485 U.S. 312, 322 (1988)). I believe that Phoenix Ordinance No. G3705 impermissibly encroaches on First Amendment freedoms and its enforcement should be enjoined.

APPENDIX B

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 94-15495

KATHERINE SABELKO and NANCY BARTO,

Plaintiffs-Appellees,

v.

THE CITY OF PHOENIX, SKIP RIMSZA,* in his official capacity as Mayor of the City of Phoenix, and THELDA WILLIAMS, FRANCES EMMA BARWOOD, CRAIG TRIBKEN, JOHN NELSON, KATHY DUBS, SALOMON F. LEIJA, and CALVIN C. GOODE, in their official capacity as members of the City of Phoenix City Council,

Defendants-Appellants.

ORDER

December 8, 1995

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*Skip Rimsza, current Mayor of Phoenix, is substituted for former Mayor Paul Johnson.

Before: SCHROEDER, BEEZER, and THOMPSON, Circuit Judges.

A majority of the panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc. Judge Beezer would grant the petition for rehearing and accept the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. CIV 93-2229-PHX-SMM

KATHERINE SABELKO and NANCY BARTO,

Plaintiffs,

v.

THE CITY OF PHOENIX, *et al.*,

Defendants.

MEMORANDUM OF DECISION AND ORDER

February 11, 1994

INTRODUCTION

On November 17, 1993 Phoenix City Ordinance No. G3705 was enacted and made immediately effective. The Ordinance, codified as Phoenix City Code § 23-10.1, provides:

> WHEREAS unimpeded access to health care services is critically and uniquely important to the public health, safety, and welfare; and

WHEREAS persons attempting to access health care facilities are subject to harassing or intimidating activity tending to impede their access to those facilities by demonstrators approaching within extremely close proximity; and

WHEREAS such activity near health care facilities creates a "captive audience" situation where persons seeking services cannot avoid the area outside the facilities, and their physical and emotional conditions may make them especially vulnerable to the adverse physiological and emotional effects of such harassing or intimidating activities directed at them from extremely close proximity; and

WHEREAS such activity in extremely close proximity tends to undermine a person's right to privacy and interfere with a person's right to seek legitimate health care treatment and counseling; and

WHEREAS this ordinance does not preclude all protesting, picketing, demonstrating, leafletting, or educational activities near a health care facility but is a necessary time, place, and manner restriction intended to reconcile and protect the First Amendment rights of demonstrators and the rights of persons using health care facilities to be free from direct confrontation, hindrance, harassment, intimidation, and harm; and

WHEREAS existing law does not adequately protect such access to health care facilities; NOW THEREFORE,

BE IT ORDAINED by the Council of the City of Phoenix as follows:

SECTION 1. Chapter 23, Article 1, Phoenix City Code is amended by adding section 23-10.1 to read:

Sec. 23-10.1 IMPEDING ACCESS TO HEALTH CARE FACILITIES

A. It is unlawful for any person, in the course of demonstration activity within the access area of a health care facility, to fail to withdraw upon a clearly communicated request to do so to a distance of at least eight (8) feet away from any person who has made the request.

B. For the purposes of this section:

1. "Access area" means any portion of a public street or other public place or any place open to the public within one hundred (100) feet of an exterior wall or entryway of a health care facility.

2. "Demonstration activity" includes but is not limited to protesting, picketing, distributing literature, attempting to impede access, or engaging in oral protest, education, or counseling activities.

3. "Health care facility" means any hospital, clinic, office, building or other place used to provide medical, psychological, nursing, or other health care services,

including family planning counseling and pregnancy-related services.

4. For purposes of this section, distance shall be measured from that part of the closest demonstrator's body that is nearest to the closest part of the requesting person's body. The term "body" includes any natural or artificial extension of a person's body including an outstretched arm or hand-held sign.

SECTION 2. WHEREAS the immediate operation of the provisions of this ordinance is necessary for the preservation of the public peace, health, and safety, an EMERGENCY is hereby declared to exist, and this ordinance shall be in full force and effect from and after its passage by the Council as required by the City Charter and is hereby exempted from the referendum clause of said Charter.

On November 23, 1993, Plaintiffs Katherine Sabelko ad Nancy Barto filed CIV 93-2229-PHX-SMM. The named Defendants are the City of Phoenix, the Mayor of Phoenix, and all members of the Phoenix City Council. The Complaint seeks declaratory and injunctive relief from Phoenix City Code § 23-10.1 [hereinafter, "the Ordinance"] which, according to Plaintiffs, "restricts the exercise of pristine First Amendment rights in traditional public fora."

In their Complaint, Plaintiffs challenge the Ordinance as: (1) Count One: a violation of the right to freedom of speech under

the First Amendment to the U.S. Constitution; (2) Count Two: a violation of the right to freedom of the press under the First Amendment to the U.S. Constitution; (3) Count Three: a violation of the right to peaceable assembly under the First Amendment to the U.S. Constitution; (4) a violation of the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution; (5) Count Five: a violation of the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution; and (6) Counts Six through Nine: violations of applicable parallel sections of the Arizona State Constitution.

Plaintiffs applied for a Temporary Restraining Order ("TRO") pursuant to Federal Rule of Civil Procedure 65. The Court granted the TRO, thereby temporarily restraining and enjoining the Defendants and any and all persons acting in concert with them, including the Phoenix Police Department, from enforcing the Ordinance. Pursuant to the stipulation of the parties, the TRO has been continued pending a determination by the Court on Plaintiffs' application for a preliminary injunction.

On December 8, 1993, Planned Parenthood of Central and Northern Arizona, Inc. [hereinafter "Petitioner"] filed (1) a Motion for Leave to Intervene in the above captioned matter, and (2) an ex parte Motion for Order Expediting Hearing on its Motion to Intervene. That same day, the Court granted the ex parte Motion for Expedited Hearing and set oral argument on the Motion to Intervene for 1:00 p.m. on Monday, December 13, 1993. The Court denied the Motion to Intervene but granted Petitioner permission to file a brief, *amicus curiae*.

The Court has reviewed the briefs submitted by the parties and the amicus. Both an evidentiary hearing and oral argument on the application for preliminary injunction were held on Friday, December 17, 1993. After careful consideration of relevant precedent, the evidence submitted, and the arguments presented,

the Court herein rules on Plaintiffs' application for a preliminary injunction.

SCOPE OF FIRST AMENDMENT JUDICIAL REVIEW

"[T]he First Amendment reflects a 'profound national commitment' to the principle that debate on public issues should be uninhibited, robust, and wide-open . . . and [the Supreme Court] ha[s] consistently commented on the central importance of protecting speech on public issues." *Boos v. Barry*, 485 U.S. 312, 318 (1988) (citations omitted).

Judicially defining the parameters of free speech is difficult. The United States Supreme Court and the lower federal courts have wrestled with this issue since the adoption of the First Amendment. The analysis is even more difficult when, as in this case, First Amendment rights clash with other competing constitutional rights. While the case law is replete with scholarly analyses of the issue concerning conflicting constitutional rights, the courts that attempt to synthesize and harmonize the conflicting viewpoints expressed in literally hundreds of pages of precedent are faced with a formidable task. More importantly, though, the citizens who must apply the holdings of these cases to the exercise of their rights in everyday life must be overwhelmed by the legal resolution of these conflicts that sometimes seem to provide conflicting practical guidance.

At this juncture, it should be noted that on January 21, 1994, the Supreme Court granted certiorari in *Madsen v. Women's Health Center, Inc.*, 1193 WL 514541, 62 U.S.L.W. 341 (Jan. 21, 1994). By granting this review, the Supreme Court will hear arguments stemming from the Florida Supreme Court's decision in *Operation Rescue v. Women's Health Center, Inc.*, 626 So.2d 664 (Fla. 1993), which upheld the provisions of an injunction that the

Eleventh Circuit Court of Appeals declared unconstitutional in *Cheffer v. McGregor*, 6 F.3d 705 (11th Cir. 1993).[1] While this Court anticipates the decision in *Madsen* will address some of the issues raised in this case, it is important to note that the procedural development of the cases is quite different. This case involves an ordinance of general applicability which imposes criminal penalties for violations. In contrast, the Florida case involves the provisions of a court-ordered injunction with limited applicability to the parties in the case, the provisions of which are only civilly enforceable.[2] Thus, the Court issues this opinion rather staying the case pending the decision in *Madsen*.

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[1]In *Cheffer*, an individual brought a judicial action seeking to preliminarily enjoin enforcement of a state court injunction that created a "buffer zone" which restricted anti-abortion speech in the vicinity of an abortion clinic. The district court refused to grant the preliminary injunction. On appeal, the Eleventh Circuit vacated the district court's order denying the preliminary injunction and remanded the case for further consideration not inconsistent with the constitutional analysis contained in its opinion, indicating the injunction should be granted.

[2]Some of the difficulty the Court experienced in grappling with the issues presented by this case stems from the fact that several of the cases upon which the parties rely are, like *Cheffer*, based on the interpretation of court-ordered injunctions rather than constitutionally based challenges to provisions of criminal or quasi-criminal law. The distinction is not merely one of semantics, but rather, as discussed later in the Court's opinion, is one of consequence.

STANDARD OF REVIEW

The purpose of a preliminary injunction is to preserve the status quo among the parties pending the outcome of the action. *Regents of the University of California v. A.B.C., Inc.*, 747 F.2d 511, 515 (9th Cir. 1974). Under the Ninth Circuit's traditional test for determining whether to issue a preliminary injunction, the moving party must demonstrate the following:

1. The moving party will suffer irreparable injury if the injunctive relief is not granted;

2. The moving party has a substantial likelihood of succeeding on the merits;

3. An injunction will not harm the non-moving party more than it helps the moving party; and

4. Granting injunctive relief is in the public interest.

City of Tenakee Springs v. Block, 778 F.2d 1402, 1407 (9th Cir. 1985); *Martin v. Int'l Olympic Comm.*, 740 F.2d 670, 674-75 (9th Cir. 1984).

In recent years, an alternative test has been articulated. Under the alternative test, the moving party must demonstrate either:

1. Probable success on the merits and the possibility of irreparable harm; or

2. The lawsuit raises serious questions and the balance of hardship tips sharply in the movant's favor.

Gilder v. PGA Tour, Inc., 936 F.2d 417, 422 (9th Cir. 1991); *City of Tenakee Springs*, 778 F.2d at 1407; *Martin*, 740 F.2d at 675; *Wilson v. Watt*, 703 F.2d 395, 399 (9th Cir. 1983); *Beltran v. Meyers*, 677 F.2d 1317, 1320 (9th Cir. 1982).

DISCUSSION

I. IRREPARABLE HARM

"It is undisputed that the loss of First Amendment freedoms for even minimal periods of time unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). Thus, the irreparable harm part of the preliminary injunction test is satisfied and tips in favor of the Plaintiffs. *See also Memphis Comm. School Dist. v. Stachura*, 477 U.S. 299 (1986) (holding monetary recovery cannot compensate for injury to intangible rights guaranteed by the Constitution).

II. LIKELIHOOD OF SUCCESS ON THE MERITS

A. First Amendment Rights Are Clearly Implicated

Plaintiffs declare that the "sidewalk counseling" in which they engage consists of "efforts to educate, counsel, persuade, or inform passer[s]by about abortion and abortion alternatives by means of verbal and written speech. . . ." Sabelko Declaration at ¶ 7; Barto Declaration at ¶ 6. There is no question that such conduct implicates First Amendment rights. *See, e.g., City of Houston v. Hill*, 482 U.S. 451 (1987) (oral protest rests at the very heart of the right to free speech); *United States v. Grace*, 461 U.S. 171 (1983) (distribution of literature via leafletting is a form speech which is an "expressive activity protected by the First Amendment").

Amicus Planned Parenthood argues that First Amendment rights are not the central issue in the case. Instead, Amicus asserts that whatever impact the Ordinance may have on First Amendment rights is secondary and incidental to the fact that the Ordinance permissibly regulates conduct. As such, the Ordinance should not be reviewed under the traditional time, place, and manner restriction on free speech test, but rather should be reviewed under the regulation of conduct test as set forth in *United States v. O'Brien*, 391 U.S. 367, 377 (1968). The Court disagrees with Amicus' characterization of this issue for several reasons.

First, the scope of the holding in *O'Brien* case as originally set forth in 1968 has been narrowed by subsequent cases. *See, e.g., Church of Scientology Flag Serv. Org., Inc. v. City of Clearwater*, 2 F.3d 1514 (11th Cir. 1993); *Abney v. United States*, 616 A.2d 856 (D.C. 1992). Moreover, the Supreme Court's decisions regarding expressive conduct as speech in *Texas v. Johnson*, 491 U.S. 397, 414 (1990) (holding flag burning to be expressive speech protected by the First Amendment), and *United States v. Eichman*, 496 U.S. 310, 319 (1990) (holding same as *Texas v. Johnson*), further limit *O'Brien* 's applicability.

Second, in *Ward v. Rock Against Racism*, 491 U.S. 781 (1989), the Supreme Court has made clear that the *O'Brien* test "is little, if any, different from the standard applied to time, place, and/or manner restrictions." *Ward*, 491 U.S. at 798.

Finally, Defendants conceded in their Response in Opposition to the Application for Preliminary Injunction and again at oral argument that they cannot argue that the Ordinance regulates conduct since it restricts the ability to distribute leaflets which has repeatedly been held to be tantamount to speech. *See, e.g., United States v. Grace*, 461 U.S. 171 (1983). The very face of the Ordinance in question in this case claims its legitimacy as a "time,

place, and manner restriction." Thus, the Ordinance must be reviewed under the time, place, and manner test.

B. Access to the Public Forum is Clearly Implicated

The degree of judicial scrutiny of the government regulation frequently turns on the nature of the place being regulated. The fora in which Plaintiffs exercise their First Amendment rights include public streets and public sidewalks. These streets and sidewalks are often within 100 feet of the entrances to medical facilities, the area regulated by the Ordinance in question n the present case. These areas constitute the "quintessential" public fora for free speech which "have been immemorially held in trust for the use of the public, and, time out of mind, have been used for purposes of assembly, communication of thoughts between citizens, and discussion of public questions." *Id.* (quoting *Hague v. Committee for Indus. Org.*, 307 U.S. 496 (1939)); *see also Frisby v. Schultz*, 487 U.S. 474, 480 (1988) (quoting *Hague*).

All of the parties agree that the communications in which Plaintiffs wish to engage are protected by the First Amendment via the Fourteenth Amendment. *See* Plaintiffs' Brief at 10; Defendants' Brief at 3; *Gitlow v. New York*, 268 U.S. 652 (1925) (holding the Fourteenth Amendment Due Process Clause protects freedom of expression against state infringement). With all parties in agreement that the Ordinance seeks to regulate activity protected by the First Amendment in a public forum, the issue is whether the Ordinance does so within the limits prescribed by the Constitution.

C. Permissible Restrictions on the First Amendment Generally

There is no doubt that the First Amendment right to free speech does not grant an unfettered right to all types of speech. *See, e.g., Roth v. United States*, 354 U.S. 476 (1957) (obscene speech); *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942) (fighting words). What is clear, though, is that "above all else the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dept. of Chicago v. Mosley*, 408 U.S. 92 (1972).

The exercise of First Amendment rights in the public forum may be limited by regulations that are valid time, place, and manner restrictions. *Frisby v. Schultz*, 487 U.S. 474, 480 (1988). The Defendants contend that the Ordinance in this case meets the "time, place, and manner restriction" test. For a time, place, and manner restriction to withstand constitutional scrutiny, the restrictions must:

1. be content neutral;

2. be narrowly tailored to serve a significant governmental interest; and

3. leave open ample alternative channels of communication.

Frisby, 487 U.S. at 481. The appropriate standard under which this three-prong test is applied to review the propriety of a time, place, and manner restriction is strict scrutiny. *United States v. Kokinda*, 497 U.S. 720, 726 (1990). Applying this test, Phoenix City Ordinance No. G3705 does not meet constitutional standards.

D. Content Neutrality

In the context of the traditional public forum, the distinction between a content-based regulation and a content neutral time, place, and manner regulation is a crucial one. Any law which regulates the time, place, and manner of protected speech must not be based on the content of the message. *E.g. Forsyth County v. Nationalist Movement*, 112 S.Ct. 2395 (1992).

Plaintiffs claim the Ordinance in question is not content neutral because is applies to the category of speech termed "demonstration activity," defined in subsection (1)(B)(2) of the Ordinance as including protesting, picketing, distributing literature, or engaging in oral protest, education, or counseling activities. While the Ordinance seemingly applies to all non-oral protesting such as picketing or distributing literature, it applies only to those spoken exercises of the right to freedom of speech which constitutes "oral protest, education, or counseling." The Defendants argue the Ordinance makes no distinctions regarding the content of communication and, ipso facto, is thus content neutral.

In *Ward v. Rock Against Racism*, 491 U.S. 781 (1989), the Supreme Court stated that "the principle inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." *Id.* at 789.

The evidence submitted by the parties regarding the legislative history of the Ordinance demonstrates, without qualification, that the Ordinance was enacted in direct response to "anti-abortion" speech outside medical clinics. *See* Transcript of Discussion on Item 4, Phoenix City Council Policy Session on November 16, 1993; Transcript of Discussion on Item 28, Phoenix City Council Meeting on November 17, 1993.

In *Portland Feminist Women's Health Center v. Advocates for Life, Inc.*, 859 F.2d 681 (9th Cir. 1988) [hereinafter "*Portland*"], an injunction against "demonstrating or distributing literature . . .; shouting, screaming, chanting, or yelling" by anti-abortion organizations and those acting in concert was deemed to be both content-neutral and a reasonable time, place, and manner restriction on speech. *Id.* at 686. The court found the preliminary injunction was not a content-based restriction of expression because it did not refer to specific viewpoints that advocates raised at demonstrations. Rather, the injunction focused on the location and manner of expression, protecting the clinic from loudness and physical intimidation, not from content of speech.[3]

Unlike the injunction in Portland, the Ordinance in question in this case specifically targets "protest" communications. The very fact that protest communications are targeted by the Ordinance indicates that the law will turn on either the content of the speech or the viewpoint expressed. If the speaker "protests," the speech is prohibited by the Ordinance. On the other hand, if the speaker "supports," the speech may or may not be violative of the Ordinance. Thus, the Ordinance imposes criminal liability depending on the content and viewpoint of speech. Viewpoint discrimination is unconstitutional. *R.A.V. v. City of St. Paul, Minn.*, 112 S.Ct. 2538 (1992).[4]

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[3]The Court recognizes that the Eleventh Circuit's decision in *Cheffer* differs from this reasoning. *Cheffer*, 6 F.3d at 710 n. 10.

[4]The Court notes that (1) the decision in *Portland* predated the Supreme Court's pronouncement regarding content neutrality in *R.A.V. v. City of St. Paul*; (2) *Portland* reviewed the terms of an injunction under the standards annunciated in Rule 65(d), a different standard than is applicable in this case, as the Court is

(continued...)

Defendants assert this is an improper characterization of the Ordinance. They claim the Ordinance does not "target" any type of speech, but rather would provide for criminal liability of any speaker who failed to withdraw to the eight-foot minimum distance, even if the speaker is demonstrating "support." The Court finds this argument unpersuasive since the invocation of the "bubble zone" will likely depend upon whether the listener agrees with or disagrees with the content of the speaker's communication. "Listeners' reaction to speech is not a content neutral basis for regulation." *Forsyth*, 112 S.Ct. at 2403.

However, even if, arguendo, the Ordinance were deemed to be content neutral, the Ordinance still fails as a time, place, and manner restriction because it is not narrowly tailored to achieve the governmental interest specified.

E. Narrowly Tailored

The First Amendment requires that a regulation on free speech be narrow and precise. *City of Houston v. Hill*, 482 U.S. 451, 464-67 (1987). A law is "narrowly tailored if it targets and eliminates no more than the exact source of the 'evil' it seeks to remedy." *Frisby*, 487 U.S. at 485 (citations omitted).

The City of Phoenix claims it has a significant governmental interest in protecting "the right of persons using health care facilities to be free from direct confrontation,

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[4](...continued)
reviewing a legislative ordinance; and (3) the *Portland* court specifically said that its analysis would differ if the injunction applied to all persons, rather than just the parties to that lawsuit, thereby precluding any "chilling effect" on the exercise of First Amendment rights in the public at large.

hindrance, harassment, intimidation, and harm." Plaintiffs asserted at oral argument that the government is seeking to protect people from "the impact of words." The Court need not decide whether the City's articulated interest is a valid, significant governmental interest within the meaning of a reasonable time, place, and manner restriction. For the purposes of this analysis, the Court presumes, for the sake of argument, that there is a valid, legitimate governmental interest at stake. Yet, even with this presumption, the Court finds the Ordinance is not narrowly tailored to achieve this interest.

The Defendants claim "this Ordinance is very narrowly tailored to serve the identified government[al] interest. The harms to persons approaching health care facilities flow from the close proximity efforts of others to force their message on unwilling listeners.[5] The Ordinance has no application away from health care facilities." Defendants' Brief at 7 (footnote added). Once again, the Court disagrees.

1. Overbreadth

The doctrine of overbreadth concerns the precision of a law, and an analysis of whether the law in question sweeps too broadly by indiscriminately reaching both protected and unprotected expression. *See, e.g., Gooding v. Wilson*, 405 U.S. 518 (1972).

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[5]The fact that Defendants argue the Ordinance seeks to protect the "unwilling listener" demonstrates that the Ordinance is not content neutral since "listeners' reaction to speech is not a content neutral basis for regulation." *Forsyth*, 112 S.Ct. at 2403. It is the very fact that some are offended by the content of the speech that affords it First Amendment protection. *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 55 (1988).

The Ordinance in this case restricts such activities as the display of signs, the distribution of literature, and even the mere voicing of statements which are of an educational, counseling, or protesting nature. Yet, the Supreme Court has affirmed the constitutionally protected status of such activities. *See Boos v. Barry*, 485 U.S. 312, 318 (1988) (public demonstration, including display of signs and placards, lies "at the core" of the "First Amendment"); *City of Houston v. Hill*, 482 U.S. 451 (1987) (oral protest rests at the very heart of the right to free speech); *United States v. Grace*, 461 U.S. 171 (1983) (distribution of literature via leafletting is a form speech which is an "expressive activity protected by the First Amendment"); *Carey v. Brown*, 447 U.S. 455, 466-67 (1980) (picketing is an exercise of "basic constitutional rights in their most pristine form").

The annunciated intent of this Ordinance is to prevent impeded access to health care facilities. The overbreadth of the Ordinance is most evident insofar as it restricts passive leafletting and handbilling even though the Supreme Court has warned against time, place, and manner restrictions on such conduct in the public forum. *See, e.g., Ward*, 491 U.S. at 799 n. 7 ("a ban on handbilling, of course, would suppress a great quantity of speech that does not cause evils that its seeks to eliminate"); *see also Martin v. Struthers*, 319 U.S. 141 (1943).

Defendants argue the Ordinance is not overbroad because its allows an individual to ban certain activities only within eight feet of his or her person.[6] Citing *Frisby v. Schultz*, 487 U.S. 474

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[6]The fact that an individual has the power to effectuate this ban, once again, demonstrates that the Ordinance is not content neutral because its application turns on the subjective reaction of the recipient of the speech at issue. *Forsyth*, 112 S.Ct. at 2403; *Boos*, 485 U.S. at 321 (O'Connor, J., concurring).

(1988), Defendants assert that Plaintiffs only have a right to distribute literature to a person willing to receive it. *Frisby*, however, upheld a municipal ordinance which prohibited picketing around a private residence. *Id.* at 483-85. The Court made it clear that the First Amendment does not permit a speaker to force an unwilling listener to be subject to the exercise of free speech in his home. The Ordinance in this case, unlike the one in *Frisby*, does not regulate speech in and around private homes but attempts to do so on public streets and sidewalks.

Defendants correctly state there is no First Amendment right to block a public street or sidewalk or to block ingress and egress to a public or private building in an effort to exercise the rights of free speech and expression. *See, e.g., Cox v. Louisiana*, 379 U.S. 536 (1965). From this proposition, and the holding in *Frisby*, Defendants mistakenly extrapolate the legitimacy of the "free zone" or "bubble zone" created by the Ordinance. Specifically, Defendants assert:

> The Phoenix City Council found that the eight foot restriction was necessary to counteract specific abuses that impede ingress to medical facilities. Plaintiffs would have this Court second-guess whether the Phoenix City Council could have achieved its goals with a narrower free zone. Faced with similar challenges, other courts have declined to entertain quibbling over a few feet.

Defendants' Response at 11.

In essence, the Ordinance's distance requirement effectively prevents handbilling and leafletting based upon the subjective reaction of the person to whom the literature is offered. It is physically impossible to hand a leaflet or handbill to someone from eight feet away. Moreover, those persons who are unwilling to

accept it are free to refuse. If the people distributing the literature attempt to force a handbill or leaflet on an unwilling recipient, other provisions of the Arizona Criminal Code protect those interests, including the provisions governing assault and battery, criminal trespass, stalking, disorderly conduct, disturbing the peace, rioting, criminal nuisance, and, in the worst case scenario, even murder.

The Court also notes that the present Ordinance is much broader than the injunction upheld in *Portland Feminist Women's Health Center v. Advocates for Life*, 859 F.2d 681 (9th Cir. 1988). First, *Portland* dealt with a civil preliminary injunction that was of limited duration. The Phoenix Ordinance is both criminal and permanent. Second, the injunction in that case was binding only on the parties to the action and no one else. In contrast, the Ordinance in this case restricts speech of all persons. Finally, the Ninth Circuit narrowed the scope of the injunction to include only "shouting, screaming, . . . [and] yelling that substantially interfere[d] with the provision of medical services within the [medical facilities at issue], including counseling." *Id.* at 686. Thus the volume of communications was reasonably restricted in time, place, and manner, but the content of these communications was not restricted. The alternative of quiet oral communication was not enjoined. The scope of the Ordinance in the present case is much broader as it restricts all types of First Amendment activities that may fall under the umbrella of "demonstration activities" whether they be peaceful or boisterous, quiet or loud, or whether they interfere with the operation of the medical facility or not. The Ordinance is therefore unconstitutionally overbroad.

2. Vesting of Power in Private Citizens

One of the most constitutionally troublesome aspects of this Ordinance is the fact that what is subject to criminal punishment

under the terms of the Ordinance is not objectively defined. The Ordinance empowers private citizens with unrestrained discretion to restrict or permit First Amendment expression. Where the criminalization of protected First Amendment expression turns on unfettered discretion, there is a substantial risk that the discretion can be used in the suppression of ideas and is therefore unconstitutional. *Thornhill v. Alabama*, 310 U.S. 88 (1940).

Defendants and Amicus argue the unfettered discretion issue was resolved by the Supreme Court in *Rowan v. United States Post Office Dep't*, 397 U.S. 728, 736 (1970). *Rowan* upheld a statute under which the recipient of a mailed advertisement could require the mailer to remove the recipient's name from its mailing lists if the advertisement offered to sell "matter which the addressee in his sole discretion believes to be erotically arousing or sexually provocative." *Id.* at 736-37. Thus, *Rowan* involved a reasonable regulation designed to protect the privacy of homeowners. As discussed below, the Supreme Court has upheld a number of restrictions on First Amendment rights when the exercise of these rights forces someone in the privacy of their own home to be an unwilling recipient of communications. See also *Frisby*, 487 U.S. at 487; *Kovacs v. Cooper*, 336 U.S. 77 (1949). Since this Ordinance in the present case regulates in the public forum away from the home the Court is not persuaded that the rationale of *Rowan* is applicable to this case.

In *Gooding v. Wilson*, 405 U.S. 518 (1972), a Georgia breach of the peace statute was held unconstitutionally overbroad. The statute made it "a breach of the peace merely to speak words offensive to some who hear them, and so [swept] too broadly." *Id.* at 527. Unlike *Gooding*, the Ordinance in this case does not, on its face, claim to impose criminal liability based on whether the listener finds the expression "offensive." However, the Ordinance does so *sub silentio*. Thus, like *Gooding*, the application of the

Ordinance would turn on the content of the message being expressed. The fact that some listeners might be disturbed or feel harassed by the content of the speech does not diminish its constitutionally protected status. If it is the speaker's opinion that gives rise to the offense, that consequence is a reason for according it constitutional protection. *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 112 S.Ct. 501, 509 (1991). In other words, it is the very fact that members of society might find the idea expressed to be offensive or disagreeable that is the basis for the First Amendment protection of the message in the first place. *See Texas v. Johnson*, 491 U.S. at 414; *United States v. Eichman*, 496 U.S. at 319.

Because a valid time, place, and manner restriction on First Amendment freedoms must be narrowly tailored, the Ordinance which fails to put objective criteria for its enforcement in place cannot stand. See *Forsyth County*, 112 S.Ct. at 2403.

3. Vagueness

The vagueness doctrine is based on due process principles that require fair notice and warning. It incorporates a requirement that a law be sufficiently specific to avoid arbitrary and discriminatory enforcement by police and courts. *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926). An unconstitutionally vague law delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972).

The most stringent of scrutiny is applied to the examination of a statute for vagueness when the statute induces a chill on free speech. *See, e.g., Hynes v. Mayor & Council of Oradell*, 425 U.S.

610, 620 (1976) (stating the general test for vagueness applies with particular force in review of laws dealing with speech); *Smith v. California*, 361 U.S. 147, 149 (1959). The requirement of specificity in legislation that impacts on First Amendment rights seeks to preclude a chill on free speech that results from vague laws: "[u]ncertain meanings inevitably lead citizens to steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked." *Grayned*, 408 U.S. at 109 (citations omitted). Applying this test to the Ordinance in question, it is clear that it cannot withstand constitutional scrutiny for vagueness.

The Ordinance by its own terms is intended to protect persons in a "captive audience"[7] who find certain speech "harassing or intimidating." Where the lawfulness of speech turns on the reactions of others, the restriction is unconstitutional. *Coates v. Cincinnati*, 402 U.S. 611, 611-14 (1971). In *Coates*, the Court struck down an ordinance that made it illegal for "three or more persons to assemble . . . on any of the sidewalks . . . and there conduct themselves in a manner annoying to persons passing by . . . ." *Id.* at 611. The Court held that a city cannot enact an ordinance whose violation depends on the subjective reactions of others. *Id.* at 614.

Defendants argue that unlike the situation in *Coates*, the present Ordinance sets a specific standard for conduct: persons engaged in demonstration activity must withdraw at least eight feet from the person making the request to do so. Defendants fail to recognize, however, that there are two distinct areas of uncertainty

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[7]The significance of a "captive audience" is discussed below at pages 28-32. Even if the captive audience doctrine were applicable in this case, that would not save the Ordinance from being unconstitutionally vague.

that are at the very crux of the vagueness problem presented by this Ordinance: (1) what is "demonstration activity"; and (2) what constitutes a "clearly communicated request" to withdraw.

The Ordinance declares that "demonstration activity" includes, but is not limited to, "protesting, picketing, distributing literature, attempting to impede access, or engaging in oral protest, education, or counseling activities." A speaker cannot, from this definition, know with constitutional certainty when speech will be deemed criminal under the terms of the Ordinance. For example, what does the term "oral protest" include? Songs? Speeches? Prayer? Because the resolution of such questions will turn on the subjective and ad hoc determinations of police, judges, and juries, the Ordinance is void for vagueness. *Grayned*, 408 U.S. at 108-09.

Moreover, what constitutes a clearly communicated request to withdraw? "I do not wish to hear from you, please withdraw to the minimum eight feet distance to allow me to pass unimpeded to the clinic" would be a clearly articulated request under the Ordinance, the failure with which to comply would subject the speaker to criminal liability. More realistically, however, the communication might be "get lost" or "buzz off." What about "shut up!"? A grunt? A push? A roll of the eyes with a mumbled swear word? The fact that the reactions and expressions of a private individual can cause the speaker to be subject to criminal liability and the fact that the speaker must interpret whether there has been a clearly communicated request to withdraw both demonstrate the lack of objective criteria that ordinary, reasonable people would have to determine whether they are subject to the provisions of the Ordinance. *See Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926).

Defendants and Amicus have pointed the Court to some authority that suggests whether there has been a clearly articulated

request to withdraw is a question of fact that would provide a defense to someone charged under the Ordinance. This begs the point. The very fact that someone will not know if they are *subject to criminal liability* under the Ordinance until *after* they are arrested and tried demonstrates why the Ordinance is vague. Judges and juries could easily differ on whether "shut up" or a similar comment clearly communicated a request to withdraw. Such subjective and ad hoc determinations show the vagueness of the Ordinance. *Grayned*, 408 U.S. at 108-09.

In short, the Ordinance uses terms which are so indefinite that persons of common intelligence must guess at their meaning and differ a to their application. The Ordinance is therefore unconstitutionally vague. *Connally*, 269 U.S. at 391.

4. Alternative Channels of Communication

The Supreme Court has held that a restriction on free speech that claims to be a valid time, place, and manner restriction must leave open alternative channels of communication. *Forsyth County*, 112 S.Ct. at 2401; *Frisby*, 487 U.S. at 481. Under this test, a regulation is invalid if the restricted forum constitutes a "uniquely valuable or important mode of communication." *Taxpayers for Vincent*, 466 U.S. at 812.

In *Taxpayers for Vincent*, the Court upheld a ban on the posting of signs on public property because the ban did not affect any individual's freedom to exercise the right to speak in the same place where the posting of signs was prohibited. *Taxpayers for Vincent*, 466 U.S. at 812. Unlike in that case, the Phoenix Ordinance reaches *all* types of communication that may fall within the vague and overbroad definition of "demonstration activities."

As stated above, the Supreme Court has recognized hand-to-hand leafletting as a uniquely valuable mode of communication protected under the First Amendment. *See, e.g., Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971). If a leafletter is required to move more than eight feet away from the intended recipient, there is no equally valuable or effective means of communication tantamount to leafletting that are left open.

The Ordinance sought to alleviate some of the "harassing or intimidating" types of confrontations that have unfortunately beleaguered the persons whom this Ordinance seeks to protect. Ironically, by preventing leafletting and handbilling, the Ordinance leaves no mode of communication open other than withdrawing to a certain distance and orally communicating with a raised voice. The Ordinance thereby forces those who wish to exercise their First Amendment rights to resort to shouting from a distance, which inevitably leads to a more hostile and confrontory environment than does peaceful handbilling and leafletting. Moreover, by forcing "demonstration activities" to occur at distances that require amplified volume for the messages to be received by the target audience, the Ordinance may be subjecting those seeking to engage in free speech activities to be subject to other criminal sanctions, such as public nuisance, disorderly conduct, and disturbing the peace. Clearly, the Ordinance therefore does not leave open ample alternative channels of communication.

III. THE BALANCING OF EQUITIES

As illustrated by the analysis above, the balancing of hardships clearly tips in favor of the Plaintiffs. Balancing the equities in this case is most difficult, though, since First Amendment rights are at issue on one hand and, in the most basic of terms, the right to be left alone is on the other. *See, e.g. Rowan*

v. United States Post Office Dep't, 397 U.S. 728, 736 (1970) ("no one has the right to press even good ideas on an unwilling recipient"). In describing this part of the preliminary injunction analysis, the Court in *Cheffer* stated:

> It is difficult indeed to weigh the relative value of different constitutional rights. Our sister circuit described a similar abortion protest case as a "clash . . . between constitutional rights defined by the Supreme Court: an old one tracing its roots to the speech clause of the First Amendment and before, and a new one stemming from *Roe v. Wade*."
>
> * * *
>
> The clash here is between an actual prohibition of speech and a potential hinderance to the free exercise of abortion rights. Should the district court issue an injunction barring the state court from enforcing its injunction as a criminal statute, it would promote only speech and expressive conduct, not assault, trespass, or destruction of property.

Cheffer v. McGregor, 6 F.3d 705, 711 (11th Cir.1993).

Part of this analysis involves the application of the so-called "captive audience" doctrine. When a case presents, as this one does, a conflict between the right to speak and the right to be left alone, the right of the listener is entitled to considerable weight when the listener is a member of a captive audience. *See, e.g., Frisby*, 487 U.S. at 487; *Cohen v. California*, 403 U.S. 15 (1971).

In general, the captive audience doctrine does not apply when the unwilling audience is located on a public street or sidewalk because they can avoid the unwanted message simply by walking away or averting their eyes. *Erznoznik v. Jacksonville*,

422 U.S. 205, 211 (1975); *Cohen v. California*, 403 U.S. at 21. It is an inevitable byproduct of life in modern day society, especially in an urban setting, that "we are often captives outside the sanctuary of the home and [thus] subject to objectionable speech." *Rowan v. United States Post Office Dep't*, 397 U.S. 728, 738 (1970). Due to this fact, the Supreme Court has consistently rejected application of the captive audience doctrine in cases involving free speech that occurs outside the home or its environs.

For example, in *Erznoznik v. Jacksonville*, 422 U.S. 205 (1975), the Court invalidated a city ordinance prohibiting drive-in movie theaters from showing films containing nudity where the screen was visible from a public street. The Court specifically found (1) the ordinance was not content neutral, and (2) the public was not a captive audience. Similarly in *Hess v. Indiana*, 414 U.S. 105 (1973), the fact that persons on a public street could not shield themselves from the use of a particularly offensive swear word in a loud voice on a public street did not give rise to a situation where the captive audience doctrine could apply. These cases illustrate that the balance between the offensive speaker and the unwilling audience may sometimes tip in favor of the speaker; the offended listener is required to turn away. *FCC v. Pacifica Foundation*, 438 U.S. 726, 749 n. 27 (1978).

The captive audience doctrine is most often applied in cases where the unwilling audience is subjected to the speaker's expressive activity near the home. For example, in *Frisby*, 487 U.S. at 487, the Court upheld a local ordinance banning "focused" picketing of a physician's private residence on the ground that the speech at issue made the residents of the doctor's house "captives" in their own home. Similarly, in *Kovacs v. Cooper*, 336 U.S. 77 (1949), the Court upheld a ban on amplified sound trucks because they were so intrusive that they made it impossible for people to escape their message.

Outside of the setting of the home, especially in the public forum, the doctrine has limited application. It is clear, though, that the captive audience doctrine can be used outside the residential setting "when the degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure." *Erznoznik*, 422 U.S. at 209. When a situation rises to the level of making it impractical for the unwilling viewer or auditor to avoid exposure is a question of degree. The most clear cut example of a captive audience are inmates in a prison. Slightly less captive are those in the armed forces or children in public schools. While the public on a street falls far short of these highly captive audiences, there are situations when the Supreme Court has applied the doctrine in the public forum.

The most practical application of the captive audience doctrine in the public forum occurs when the unwilling audience is physically constrained by their environment. For example, in *Lehman v. Shaker Heights*, 418 U.S. 298 (1974), a plurality opinion by the Supreme Court found the doctrine to apply to rapid transit passengers on municipally-owned buses.

The Court finds that the captive audience rationale does not apply under the facts and circumstances of this case. The types of restrictions upheld in *Frisby* and *Kovacs* are far less restrictive than those imposed by the Ordinance in this case since those cases left open other alternative channels for communication. Unlike in *Lehman*, the forum being regulated by the Phoenix Ordinance includes public streets and sidewalks, not the enclosure of a bus, streetcar, or subway train.

Given the overbreadth of the Ordinance, it cannot be said that every person seeking access to every medical facility in the City of Phoenix is a captive to whatever message a person may be seeking to deliver in the public fora surrounding these facilities.

For example, people are not forced to take and read literature offered to them outside a medical facility. They have the choice not to accept a leaflet or handbill. They also have the choice to take what is offered and simply discard it without ever reading it by "simply averting their eyes." *Erznoznik*, 422 U.S. at 211. The ability of an individual to effectuate a ban on handbilling under the provisions of the Ordinance demonstrates that the Ordinance simply goes too far in seeking to protect the right o be left alone.

Additionally, because the Ordinance is not narrowly tailored to advance the governmental interest of providing unimpeded access to medical facilities, the captive audience doctrine cannot be used to salvage the Ordinance. In *City of Watseka v. Illinois Public Action Council*, 796 F.2d 1547 (7th Cir. 1986), *aff'd without opinion*, 499 U.S. 1048 (1987), the court declared an ordinance unconstitutional which regulated door-to-door solicitation of private residences. The court found that the ordinance was not narrowly tailored to meet even the captive audience problem of the unwilling audience in the home. The Supreme Court summarily affirmed the decision.

Given the multiplicity of constitutional problems with this Ordinance and the extent of these constitutional infirmities, the First and Fourteenth Amendment rights of those who may be the subject of criminal prosecution under the Ordinance must outweigh the rights of those who seek to be left alone, even if a captive audience situation were to apply.

Enjoining the enforcement of the Ordinance promotes only speech and expressive conduct protected by the First Amendment. By issuing the injunction today, the Court does not condone "assault, trespass, or destruction of property," or any other forms of violence. *Cheffer*, 6 F.3d at 711. The Constitution provides for peaceable assembly, not riotous behavior or mayhem. The City

has at its disposal many laws to deal with those individuals who cannot peaceably assemble to exercise their freedom of expression to which the Constitution is no bar. The City may also choose to revise the Ordinance in question within the boundaries prescribed by the Constitution. *See National Organization for Women v. Operation Rescue*, 914 F.2d 582 (4th Cir. 1990) (upholding injunction prohibiting pro-life organization and its members from trespassing on, blockading, impeding, or obstructing access to or egress from medical clinics at which abortions were performed), *rev'd in part & vacated in part, sub nom. Bray v. Alexandria Women's Health Clinic*, 113 S.Ct. 753 (1993) (holding the Klu Klux Klan Act, 42 U.S.C. § 1985, could not be used to bring suit for conspiracy to deprive constitutional rights against anti-abortion protestors).[8]

IV. THE PUBLIC INTEREST

Freedom of expression is at the very core of our constitutional liberties. The First Amendment continues to reflect a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open . . . ." *Boos*, 485 U.S. at 318. Such robust debate is always accompanied by differences of opinion. Often these differences are profound and spark intensity of feeling and emotion. Indeed, "vehement, caustic, and sometimes unpleasantly sharp" speech is protected by the Constitution. *New York Times Co. v. Sullivan*, 376 U.S. 254,

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[8]The Supreme Court recently held in *National Organization for Women, Inc. v. Scheidler*, 1994 WL 13716, 62 U.S.L.W. 4073 (U.S. Jan. 24, 1994), that RICO statutes could be used to prosecute demonstrators who protest outside medical facilities which provide abortion services. While worthy of mention, the Court does not believe that the decision in that case impacts the Court's analysis in the present case.

270, (1964). There are, no doubt, times when all of us wish that we did not have to put up with another person's exercise of these protected rights. Such, however, is the price we pay for living in a democracy. It serves the public interest to issue the injunction since doing so thereby fosters our democratic ideals and freedoms.

CONCLUSION

The City of Phoenix passed the Ordinance in an attempt to provide unimpeded access to health care services for its citizens. While the Court understands the City's motives in establishing a neutral zone of passage around Phoenix medical facilities, the Court cannot overlook the fact that the mechanism the City uses to accomplish this end is an ordinance which fails to meet constitutional standards under the First Amendment.

For the reasons set forth above, the Court finds:

1. The Plaintiffs will suffer irreparable injury if the injunctive relief is not granted.

2. The Plaintiffs have demonstrated a substantial likelihood of succeeding on the merits because the Ordinance is not a valid time, place, and manner regulation of free speech due to the fact that:

   (a) the Ordinance is not a content neutral regulation of free speech;

   (b) the Ordinance is not narrowly tailored to achieve the stated governmental interest;

   (c) the Ordinance is unconstitutionally vague; and

(d) the Ordinance fails to leave open alternative methods of communication in the public forum in which the law regulates.

3. The issuance of the injunction will not harm the City of Phoenix more than it helps the Plaintiffs.

4. Granting injunctive relief is in the public interest, as it fosters the core constitutional value of freedom of expression.

ORDER

IT IS ORDERED that Plaintiffs' Application for a Preliminary Injunction is hereby **GRANTED**.

IT IS FURTHER ORDERED that Phoenix City Ordinance No. G3705, codified as Phoenix City Code § 23-10.1, is hereby **DECLARED UNCONSTITUTIONAL** as violative of the First and Fourteenth Amendments of the United States Constitution.

IT IS FURTHER ORDERED that the Defendants, and any and all persons acting in concert with them, including, but not limited to their agents, servants, employees, attorneys, and the Phoenix Police Department, are hereby **RESTRAINED AND ENJOINED** from enforcing Phoenix City Ordinance No. G3705, codified as Phoenix City Code § 23-10.1, due to the unconstitutionality of the Ordinance as described herein.

Dated this 11th day of February, 1994.

/s/ Stephen M. McNamee
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. CIV 93-2229-PHX-SMM

KATHERINE SABELKO and NANCY BARTO,

Plaintiffs,

v.

THE CITY OF PHOENIX, *et al.*,

Defendants.

JUDGMENT IN A CIVIL CASE

February 11, 1994

___ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

XXX **Decision by Court.** This action came to trial or hearing before the Court. The Issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED plaintiffs' Application for a Preliminary Injunction is granted.

FURTHER ADJUDGED that Phoenix City Ordinance No. G3705, codified as Phoenix City Code § 23-10.1, is hereby declared unconstitutional as violative of the First and Fourteenth Amendments of the United States Constitution.

FURTHER ADJUDGED that the defendants, and any and all persons acting in concert with them, including, but not limited to their agents, servants, employees, attorneys, and the Phoenix Police Department, are hereby restrained and enjoined from enforcing Phoenix City Ordinance No. G3705, codified as Phoenix City Code § 23-10.1, due to the unconstitutionality of the Ordinance.

February 11, 1994
Date

Richard H. Weare
Clerk

/s/ C. Evans
(By) C. Evans, Deputy Clerk

APPENDIX E

ORDINANCE NO. G3705

AN ORDINANCE AMENDING CHAPTER 23, ARTICLE 1 OF THE PHOENIX CITY CODE, BY ADDING SECTION 23-10.1, RELATING TO UNIMPEDED ACCESS TO HEALTH CARE FACILITIES; AND DECLARING AN EMERGENCY.

WHEREAS, unimpeded access to health care services is critically and uniquely important to the public health, safety and welfare; and

WHEREAS, persons attempting to access health care facilities are subject to harassing or intimidating activity tending to impede their access to those facilities by demonstrators approaching within extremely close proximity; and

WHEREAS, such activity near health care facilities creates a "captive audience" situation where persons seeking services cannot avoid the area outside the facilities, and their physical and emotional conditions may make them especially vulnerable to the adverse physiological and emotional effects of such harassing or intimidating activities directed at them from extremely close proximity; and

WHEREAS, such activity in extremely close proximity tends to undermine a person's right to privacy and interfere with a person's right to seek legitimate health care treatment and counseling; and

WHEREAS, this ordinance does not preclude all protesting, picketing, demonstrating, leafleting or educational activities near a health care facility but is a necessary time, place and manner

restriction intended to reconcile and protect the First Amendment rights of demonstrators and the rights of persons using health care facilities to be free from direct confrontation, hindrance, harassment, intimidation and harm; and

WHEREAS, existing law does not adequately protect such access to health care facilities; NOW THEREFORE,

BE IT ORDAINED by the Council of the City of Phoenix as follows:

SECTION 1. Chapter 23, Article 1, Phoenix City Code, is amended by adding section 23-10.1 to read:

Sec. 23-10.1 IMPEDING ACCESS TO HEALTH CARE FACILITIES.

A. It is unlawful for any person, in the course of demonstration activity within the access area of a health care facility, to fail to withdraw upon a clearly communicated request to do so to a distance of at least eight (8) feet away from any person who has made the request.

B. For purposes of this section:

1. "Access area" means any portion of a public street or other public place or any place open to the public within one hundred (100) feet of an exterior wall or entryway of a health care facility.

2. "Demonstration activity" includes but is not limited to protesting, picketing, distributing literature, attempting to impede access,

or engaging in oral protest, education or counseling activities.

3. "Health care facility" means any hospital, clinic, office, building or other place used to provide medical, psychological, nursing or other health care services, including family planning counseling and pregnancy- related services.

C. For purposes of this section, distance shall be measured from that part of the closest demonstrator's body that is nearest to the closest part of the requesting person's body. The term "body" includes any natural or artificial extension of a person's body including but not limited to an outstretched arm or a hand-held sign.

SECTION 2. WHEREAS, the immediate operation of the provisions of this ordinance is necessary for the preservation of the public peace, health and safety, an EMERGENCY is hereby declared to exist, and this ordinance shall be in full force and effect from and after its passage by the Council as required by the City Charter and is hereby exempted from the referendum clause of said Charter.

PASSED by the Council of the City of Phoenix this 17th day of November, 1993.

/s/ Paul Johnson
Mayor

ATTEST:
/s/ Vicky Miel City Clerk
APPROVED AS TO FORM:
/s/ Rod McDougall City Attorney
REVIEWED BY:
/s/ Frank Fairbanks City Manager

APPENDIX F

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CV 94-2243 RG (JRx)

VICKIE L. EDWARDS, *et al.*,

Plaintiffs,

v.

THE CITY OF SANTA BARBARA, *et al.*,

Defendants.

ORDER

Dated March 13, 1995
Filed March 14, 1995
Entered March 15, 1995

This matter came before the Court on Plaintiffs' renewed motion for a preliminary injunction and Defendants' motion for summary judgment. Plaintiffs' motion is **GRANTED** and Defendants' is **DENIED**.

I. BACKGROUND

In May of 1993, the City Council of defendant City of Santa Barbara ("the City") adopted an ordinance limiting protest activity outside medical clinics and places of worship ("the Ordinance"). The Ordinance was passed in the wake of complaints by individuals and organizations about the conduct of anti-abortion protestors. For instance, a representative of a local Planned Parenthood clinic complained that protestors were disrupting traffic, impeding access to the clinic, and confronting patients and staff members in a harassing fashion. *See, e.g.*, Exhibits 103, 104 to Defendants' Opposition to Preliminary Injunction (letters to City Council members from Executive Director of Planned Parenthood of Santa Barbara, detailing incidents and complaints and requesting legislative response). There were also complaints that protestors had confronted abortion providers at their churches.

A. The Ordinance

The Ordinance has two main provisions.[1] Section 9.99.030 ("the Driveway Provision") prohibits all "demonstration activity" on or within eight feet of the driveway of a health care facility or place of worship.[2] "Demonstration activity" is defined to include "all expressive or symbolic content, whether active or

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[1]The full text of the Ordinance is set forth in the Appendix to this Order.

[2]The second clause of Section 9.99.030 prohibits impeding access to a clinic or place of worship: "No person shall impede access to a driveway entrance of a health care facility or place of worship by any conduct which delays or impedes the flow of pedestrian or vehicular traffic in or out of such facility." Plaintiffs do not challenge this provision.

passive. . . ." Ordinance at 9.99.010(D). Section 9.99.020 ("the Bubble Zone Provision")[3] forbids a person from "impeding" or "hampering" access to a health care facility or place of worship by failing to withdraw to eight feet away from a person when the person so requests. This provision is effective in the "access area", which is the area within 100 feet of a health facility or place of worship. Ordinance at 9.99.010(A). Obviously, both provisions encompass activity on public sidewalks.

B. The Instant Suit

This action was brought by two anti-abortion "sidewalk counselors" who challenge the constitutionality of the Ordinance. Plaintiffs Vickie Edwards ("Edwards") and Kathleen Rose McCaulley ("McCaulley") claim that they seek, *inter alia*, to "engage in peaceful hand-to-hand leafletting, one-on-one counseling about abortion alternatives, and periodically hold signs with a pro-life, anti-abortion message." McCaulley Declaration at ¶ 4; Edwards Declaration at ¶ 4. Edwards and McCaulley want to conduct these activities outside of medical facilities providing abortion services within the City.

Both Edwards and McCaulley claim that the Ordinance chills and deters them from this planned expressive activity. Specifically, they claim that they are afraid to engage in any communicative activities within eight feet of a clinic driveway. Edwards Declaration at ¶¶ 12-13; McCaulley Declaration at ¶¶ 12- 13. Edwards complains that the Bubble Zone Provision prevents her from conducting effective one-on-one counseling or leafletting, as the eight-foot zone makes it impossible to hand

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[3]Some of the cases on this subject use the term "bubble zone" very broadly to encompass all limited-speech areas. This Court uses it only to describe one specific provision of the Ordinance.

leaflets to people and forces her to speak at a volume that "prevents empathy and sometimes even causes stress." Second Edwards Declaration at ¶ 9-11. Edwards has been arrested for violation of the Driveway Provision, though the charges were dismissed. Fourth Edwards Declaration at ¶¶4-10.[4]

Plaintiffs brought the instant suit for injunctive relief against the City and members of the City Council, arguing that the Driveway and Bubble Zone Provisions violate the First Amendment to the United States Constitution. This Court denied a motion for a preliminary injunction against the Driveway Provision in an order dated May 24, 1994.[5]

Plaintiffs now move for a preliminary injunction against both provisions, presenting evidence of legislative history for the first time. Defendants move for summary judgment, arguing that the undisputed facts show that the Ordinance is constitutional.

II. THE LEGAL STANDARDS

A. The Standard for Summary Judgment

Under F.R.C.P. 56, summary judgment is proper if there are no genuine issues of material fact and the moving party is

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[4]Based on these facts, there is no question that plaintiffs have standing to make a facial, pre-enforcement challenge to the Ordinance. See *Virginia v. American Booksellers Ass'n, Inc.*, 484 U.S. 383, 393, 108 S.Ct. 636, 98 L.Ed.2d 782 (1988); *Ripplinger v. Collins*, 868 F.2d 1043, 1046 (9th Cir.1989). Defendants do not argue otherwise.

[5]To the extent that this Court's previous ruling is inconsistent with this opinion, it is hereby **VACATED**.

entitled to a judgment as a matter of law. F.R.C.P. 56(c). A party resisting summary judgment has the affirmative obligation to bring forward evidence "on which the jury could reasonably find for [the nonmoving party]." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). A mere scintilla of evidence will not suffice. "Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial'." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986).

B. The Standard for a Preliminary Injunction

The Ninth Circuit's traditional test for determining whether to issue a preliminary injunction requires the moving party to demonstrate the following:

1. The moving party will suffer irreparable injury if the injunctive relief is not granted;

2. The moving party has a substantial likelihood of succeeding on the merits;

3. An injunction will not harm the non-moving party more than it helps the moving party; and

4. Granting injunctive relief is in the public interest.

City of Tenakee Springs v. Block, 778 F.2d 1402, 1407 (9th Cir. 1985); *Martin v. Int'l Olympic Comm.*, 740 F.2d 670, 674-75 (9th Cir. 1984).

More recently, the Ninth Circuit has articulated an alternative test. Under this test, the moving party must demonstrate either:

> 1. Probable success on the merits and the possibility of irreparable harm; or
>
> 2. The lawsuit raises serious questions and the balance of hardships tips sharply in the movant's favor.

Gilder v. PGA Tour, Inc., 936 F.2d 417, 422 (9th Cir. 1991).

Therefore, for the purpose of plaintiffs' motion, this Court must evaluate whether plaintiffs have shown probable success on the merits and the possibility of irreparable harm.

III. AN OVERVIEW OF FIRST AMENDMENT ANALYSIS

This case presents a facial challenge to a time, place, and manner restriction of speech in a public forum. Therefore, the Court's First Amendment analysis will proceed in discrete and predictable stages. *See, e.g.*, *Ward v. Rock Against Racism*, 491 U.S. 781, 791, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989).

First, the Court must determine if the Ordinance is content neutral. If the Ordinance is not content neutral, it is presumptively invalid, and will only survive if the City can show that it is necessary to serve a compelling state interest, and narrowly tailored to meet that end. *Simon & Schuster v. Crime Victims Bd.*, 502 U.S. 105, --, 112 S.Ct. 501, 116 L.Ed.2d 476, 486-488 (1991). If the Ordinance is content neutral, then it will stand if it is narrowly tailored to serve a significant government interest. *Ward*, 491 U.S. at 791, 109 S.Ct. at 2746, 105 L.Ed.2d 661.

A restriction of First Amendment activity is narrowly tailored if it "targets and eliminates no more than the exact source of the 'evil' it seeks to remedy." *Frisby v. Schultz*, 487 U.S. 474, 108 S.Ct. 2495, 101 L.Ed.2d 420 (1988). This Court's determination of whether the Ordinance is narrowly tailored entails a constitutional overbreadth analysis of both the Bubble Zone and the Driveway provisions.

"Only a statute that is substantially overbroad may be invalidated on its face." *New York v. Ferber*, 458 U.S. 747, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982); *Broadrick v. Oklahoma*, 413 U.S. 601, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973). Here, this Court must first determine whether the enactment of the Ordinance reaches a substantial amount of constitutionally protected conduct, *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. at 494, 102 S.Ct. 1186, 71 L.Ed.2d 362. Special scrutiny is called for in the case of a criminal ordinance such as this one. *Winters v. New York*, 333 U.S. 507, 515, 68 S.Ct. 665 (1948).

IV. CONTENT NEUTRALITY

The first step in the First Amendment analysis of the Ordinance is the question of content neutrality. If the Ordinance is not content-neutral, the City must pass the nearly insurmountable barrier of presumptive invalidity. *See Simon & Schuster*, 502 U.S. --, 112 S.Ct. at 501, 116 L.Ed.2d at 486-487. If it is content-neutral, then it will pass muster if it is "narrowly tailored to serve a significant government interest." See *Ward*, 491 U.S. at 791, 109 S.Ct. at 2746, 105 L.Ed.2d at 661; *Clark v. Community for Creative Nonviolence*, 468 U.S. 288, 293, 104 S.Ct. 3065, 82 L.Ed.2d 221 (1984).

Plaintiffs' arguments about content-neutrality may be separated into four discrete areas: the face of the statute; the

legislative intent; neutrality of enforcement; and reference to the reaction of the audience.

A. The Face of the Statute

As this Court found in its previous Order, the Ordinance is facially neutral. It does not single out any viewpoint or subject, but applies equally to all expressive activity within the proscribed areas.[6]

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[6]Plaintiffs point to *Sabelko v. City of Phoenix*, 846 F.Supp. 810 (D. Ariz. 1994), in which an Arizona district court found that a similar statute was content-biased on its face. The *Sabelko* Court based its decision on the fact that the statute before it focused on "protest." That statute read:

> Demonstration activity includes but is not limited to protesting, picketing, distributing literature, attempting to impede access, or engaging in oral protest, education, or counseling activities.

Id. at 814. According to the *Sabelko* Court, the emphasis on "protest" meant that the statute turned on the content of the speech or the viewpoint expressed:

> If the speaker "protests," the speech is prohibited by the Ordinance. On the other hand, if the speaker "supports," the speech may or may not be violative of the Ordinance. Thus, the Ordinance imposes criminal liability depending on the content and viewpoint of speech.

Id. at 819.

However, this case is distinguishable from *Sabelko*. In the Ordinance before this Court, "demonstration activity" is defined as:

> *All expressive and symbolic conduct*, whether active or passive, which shall include, but not be limited to, protesting, picketing, distributing literature, and engaging

(continued...)

B. The Legislative Intent

A facially neutral statute is still presumptively invalid if it is designed to suppress a particular viewpoint. "The government may not regulate [expression] based on hostility--or favoritism --towards the underlying message expressed." *R.A.V. v. St. Paul*, 505 U.S. --, --, 112 S.Ct. 2538, 120 L.Ed.2d 305, 320 (1992). However, it is important to distinguish an attempt to suppress a viewpoint from an attempt to deal with the *effects* of particular conduct or speech:

> The principal inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of the speech *because of disagreement with the message it conveys*. The government's purpose is the controlling consideration. A regulation that serves purposes unrelated to the content of expression is deemed neutral, *even if it has an incidental effect on some speakers or messages but not others*. Government regulation of expressive activity is content-neutral *so long as it is justified without reference to the content of the regulated speech*.

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[6](...continued)

in oral or silent protest, education or counseling activities. Ordinance at 9.99.010(D) (emphasis added). Clearly, this extraordinarily broad language does not exclude "support" while targeting "protest," but applies to all conceivable expression. The phrase "all expressive and symbolic conduct" renders the Ordinance facially neutral at the expense of gross overbreadth, as discussed below.

Ward, 491 U.S. at 791, 109 S.Ct. 2746, 105 L.Ed.2d 661 (cites omitted, emphasis added). *See also Renton v. Playtime Theatres*, 475 U.S. 41, 47-49, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986).

Plaintiffs assert that the legislative history of the Ordinance demonstrates that its drafters were motivated by hostility to the anti-abortion viewpoint. In support of this theory, Plaintiffs have submitted extensive legislative history, including letters to City Council members, newspaper articles, and a transcript of the City Council meeting at which the Ordinance was adopted.

However, as *Ward* makes clear, it is not enough to show that the anti-abortion protests inspired the City Council to act, or that the Ordinance has a disproportionate effect on people with anti-abortion views. Plaintiffs must show that drafters acted out of hostility towards the anti-abortion viewpoint, or in an effort to suppress it. *Ward*, 491 U.S. at 791, 109 S.Ct. 2746, 105 L.Ed.2d at 661.[7]

Plaintiffs fall short of this showing. The legislative history demonstrates that the City Council was motivated by concern that anti-abortion protests were preventing free access to medical clinics and churches. The fact that Planned Parenthood requested the Ordinance because of anti-abortion protests demonstrates nothing more than concern with the *effects* of protest conduct. The flood of letters concerned with access to abortion clinics on the one hand, and the free speech rights of anti-abortion protestors on the other, centered on this issue. Similarly, the extensive citizen statements

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[7]Plaintiffs cite *Sabelko* for the opposite proposition. However, as discussed above, the *Sabelko* Court based its finding of content bias on the fact that the ordinance before it banned only "protest" expression outside clinics, unlike the Ordinance here. *Sabelko*, 846 F.Supp. at 819.

at the City Council hearing demonstrate concerns about the *effects* of anti-abortion protests and the rights of the protestors. None of this serves as evidence that the Council acted out of animus towards the anti-abortion viewpoint.

Plaintiffs emphasize the comments of City Council member Harold Fairly, who opined that the Ordinance "is content motivated, and that's been made very clear by the nature of today's discussion." Hearing Transcript at 54. However, Mr. Fairly is not an arbiter of content neutrality. The rest of his comments reveal that he shares plaintiffs' incorrect conception of content neutrality: he thinks that the Ordinance is content-biased because it was motivated by the effects of anti-abortion protests. He also thinks that the Ordinance would become content-neutral if it dealt with protests at schools as well. Hearing Transcript at 56. Finally, in later comments, he acknowledges:

> For my own case . . . I would not let my vote be interpreted as either being for abortion or against abortion. I am voting on this issue on the basis . . . that it is an access issue.

Transcript at 60. Mr. Fairly's comments do not demonstrate that the City Council acted out of hostility towards a particular viewpoint.

Plaintiffs compare this legislative process with that in *Church of Lukumi v. Hialeah*, 508 U.S. --, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993), in which the Supreme Court struck down a local ordinance because of the viewpoint bias reflected in the legislative history. However, the facts of *Hialeah* are distinguishable from this case. The Hialeah City Council acted not only out of concern for the effects of animal sacrifice, but out of a distinct and pervasive hostility towards the beliefs of the Santeria religion. For instance, the president of the Hialeah City Council

asked "What can we do to prevent the Church from opening?" 508 U.S. at --, 113 S.Ct. at 2127, 124 L.Ed.2d at 496. The Resolution adopted by the Hialeah City Council included the statement, "This community will not tolerate religious practices which are abhorrent to its citizens. . . ." *Id.* The Supreme Court found that the "pattern we have recited discloses *animosity to Santeria adherents and their religious practices*. . . ." *Id.* (emphasis added). By contrast, plaintiffs have not demonstrated that the drafters of the Ordinance here bore any hostility towards the anti-abortion viewpoint.

Plaintiffs suggest that they have proved viewpoint animus by showing that certain members of the Santa Barbara City Council were affiliated with pro-choice groups. The Ordinance was requested by the Executive Director of Planned Parenthood of Santa Barbara, who wrote a letter to City Council members Harriet Miller and Eleanor Langer. *See* Plaintiffs' Exhibits Nos. 918-959. Langer was a member of the Board of Directors of Planned Parenthood when the Ordinance was enacted. Plaintiff's Exhibit Nos. 1242. Council member Miller "has attended Planned Parenthood meetings." Mayor Sheila Lodge, who is on the Council, is also a member of Planned Parenthood and serves as a volunteer "escort." Rollings Deposition at P51, L18. Plaintiffs conclude that these affiliations prove viewpoint discrimination. Plaintiffs' Opposition to Summary Judgment at 23. They have proved no such thing. Even though such membership permits an inference that these individuals may disagree with the anti-abortion viewpoint, plaintiffs have utterly failed to connect that disagreement to the enactment of this Ordinance. As discussed above, plaintiffs' evidence shows only that the Council members wanted to protect free access to clinics and churches.

Plaintiffs have not shown that the Ordinance was motivated by disagreement with the anti-abortion viewpoint; in fact, their

evidence shows that it was justified by reference to effects, not content. Therefore, their argument about legislative intent must fail. *Ward*, 491 U.S. at 791, 109 S.Ct. at 2746, 105 L.Ed.2d 661.

C. Neutrality of Enforcement

Plaintiffs assert that the history of enforcement of the Ordinance demonstrates its viewpoint bias, and argue that a law is not content-neutral when its enforcement turns on scrutiny of the content of expression. *See, e.g., Simon & Schuster*, 502 U.S. at --, 112 S.Ct. 501, 116 L.Ed.2d at 487 (1991); *Arkansas Writer's Project v. Ragland*, 481 U.S. 221, 230, 107 S.Ct. 1722, 95 L.Ed.2d 209 (1987); *Hialeah*, 508 U.S. at --, 113 S.Ct. 2127, 124 L.Ed.2d at 489-490 (1993).

Plaintiffs marshall two arguments in support of this point. First, they show that the vast majority of those cited under the Ordinance (97 out of 101, as of the time of the motion) were anti-abortion protestors. Second, they cite the deposition of a police officer for the proposition that enforcement is based on the content of expression. *See* Deposition of Michael Foxen.

The evidence of arrests is inadequate to show biased enforcement. Plaintiffs merely demonstrate that many anti-abortion demonstrators have been cited under the Ordinance. They present no evidence that protestors with different messages have violated the Ordinance without being arrested. In other words, there is no evidence to rebut the inference that anti-abortion protestors are most often arrested because they are the ones most often in violation of the Ordinance.

Plaintiffs' second argument is more troubling. As they point out, Officer Foxen testified that application of the Ordinance depends on whether someone is expressing some type of an opinion

in the prohibited zones. Foxen Deposition at 56. He gives many damning examples; for instance, he says that someone playing a country-western song in the zone would not be in violation, but someone singing an anti-abortion song would be. *Id.* at 51. Moreover, despite defendants' arguments to the contrary, it appears that Officer Foxen has put his views into practice. *See, e.g.*, Foxen Deposition at 29 (person arrested for "expressing his opinion within the zone"); *Id.* at 25 (person arrested because "his being in the zone with the Bible constituted his attempting to express his opinion within a demonstration-free zone."); *Id.* at 41 (arrest because subject "was, by his presence, . . . attempting to express his opinion").

However, based on this Court's conclusion that the Ordinance is overbroad, it need not resolve the difficult question of whether this pattern of enforcement renders the Ordinance content-based.[8]

D. Dependence on Listener's Reactions

Plaintiffs also assert that the Ordinance is not content-neutral because it makes the legality of speech dependent on the reaction of the audience. It is well established that a "[l]istener's reactions to speech is not a content neutral basis for regulation." *Forsyth County, Ga. v. Nationalist Movement*, 505 U.S. --, --, 112 S.Ct. 2395, 120 L.Ed.2d 101, 114 (1992); *Texas v. Johnson*, 491 U.S. 397, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989); *Boos v. Barry*, 485 U.S. 312, 108 S.Ct. 1157, 99 L.Ed.2d 333 (1988).

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[8]The Court notes that Officer Foxen's testimony provides many practical examples of overbroad application of the Ordinance.

Plaintiffs' argument on this point must be divided into two themes. First, they suggest that the entire Ordinance is content-biased because it is motivated out of concern for the psychological effects of protest on persons seeking access to the clinics or churches. Second, they argue that the "Bubble zone" provision is content biased because it makes the right to speak within the 8-foot zone dependent on the listener's willingness to tolerate the speech.

1. Concern with Psychological Effects

It is true that the Ordinance is partially motivated by the "adverse psychological and emotional effects of such harassing or intimidating activities directed at them from extremely close proximity." *See* Appendix A. However, this is not the sort of government motivation that runs afoul "listener's reaction" rule as articulated by the Supreme Court. In *Forsyth County*, the Court struck down an ordinance that set a variable for parade permits. The fee was calculated depending on the probable cost of police protection for the parade; thus, the vehemence of the opposition to the parade's message determined the cost of the expression. *Forsyth County*, 505 U.S. at --, 112 S.Ct. 2395, 120 L.Ed.2d at 115. Similarly, the import of the Court's ruling in *Johnson* was that the strength of opposition to flag burning did not justify banning it. *Johnson*, 491 U.S. at 408-409, 109 S.Ct. at 2553, 105 L.Ed.2d 342. In other words, this line of cases does not involve statutes protecting listeners from emotional harm; rather, it dealt with statutes limiting speech because of its tendency to inflame listeners.

By contrast, the Supreme Court has upheld statutes whose rationales include mitigation of harmful emotional and psychological impact. Notably, in *Madsen v. Women's Health Center*, 512 U.S. --, 114 S.Ct. 2516, 129 L.Ed.2d 593 (1994), the

Supreme Court approved Florida's argument that it had a legitimate governmental interest in restricting protests around medical clinics because "targeted picketing of a hospital or clinic threatens not only the psychological, but the physical well-being of the patient held 'captive' by medical circumstance." 512 U.S. at --, 114 S.Ct. 2516, 129 L.Ed.2d at 609. The Supreme Court based this logic on its prior holding in *Frisby*, 487 U.S. 474, 108 S.Ct. 2495, 101 L.Ed.2d 420 (1988), in which the Court found a significant government interest in protecting the tranquility of the home because of the interest of protecting the privacy of a "captive audience." 487 U.S. at 484-485, 108 S.Ct. 2495, 101 L.Ed.2d 420. This precedent establishes that the Ordinance's concern with emotional impact on listeners does not signify content bias.

Based on these conclusions about content neutrality, this Court must next determine whether the Ordinance is narrowly tailored to serve a significant government interest. *Ward*, 491 U.S. at 791, 109 S.Ct. at 2746, 105 L.Ed.2d 661.

2. The Bubble Zone Provision

Plaintiffs also argue that the Bubble Zone Provision runs afoul of the *Forsyth County* rule on listener reaction because it makes their right to speak dependent on the listener's willingness to hear. This was the rationale of the *Sabelko* Court, which found that a nearly identical "bubble zone" was content biased because it depended on listener reaction. 846 F.Supp at 819.

Faced with a similar "bubble zone" injunction that prohibited protestors from approaching patients without consent, the Supreme Court struck down the injunction as overbroad and declined to engage in content neutrality analysis. *Madsen*, 512 U.S. at --, 114 S.Ct. 2516, 129 L.Ed.2d at 613 n. 6. This Court elects to take the same approach. Because this Court finds that the

Bubble Zone Provision is overbroad, it need not resolve the difficult issue of its content neutrality.

V. NARROWLY TAILORED

"The First Amendment requires that a regulation on free speech be narrow and precise." *City of Houston v. Hill*, 482 U.S. 451, 464-7, 107 S.Ct. 2502, 96 L.Ed.2d 398 (1987). A law is narrowly tailored "if it targets and eliminates no more than the exact source of the 'evil' it seeks to remedy." *Frisby*, 487 U.S. at 485, 108 S.Ct. 2495, 101 L.Ed.2d 420, *quoting Members of the City Council of the City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 808-810, 104 S.Ct. 2118, 80 L.Ed.2d 772 (1984). Plaintiffs contend that the Driveway and Bubble Zone Provisions are not narrowly tailored to serve a significant governmental interest because they are facially overbroad. In effect, Plaintiffs contend that both provisions impermissibly sweep in protected activity beyond that required to serve the legitimate governmental purpose underlying the ordinance, the protection of access to medical clinics and places of worship.

A. Overbreadth

Under First Amendment overbreadth analysis, an individual may challenge a statute on its face because it threatens others not before the court "who desire to engage in legally protected expression but who may refrain from doing so rather than risk prosection or undertake to have the law declared partially invalid." *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 503, 105 S.Ct. 2794, 86 L.Ed.2d 394 (1985).

In engaging in an overbreadth analysis, this Court must tread lightly. "Only a statute that is substantially overbroad may be invalidated on its face." *Hill*, 482 U.S. at 458, 107 S.Ct. 2502,

96 L.Ed.2d 398 (1987), *citing Ferber*, 458 U.S. at 769, 102 S.Ct. 3348, 73 L.Ed.2d 1113. "The requirement that the overbreadth be substantial arose from our recognition that application of the overbreadth doctrine is, 'manifestly, strong medicine,' and that 'there must be a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court for it to be facially challenged on overbreadth grounds.'" *Taxpayers for Vincent*, 466 U.S. at 801, 104 S.Ct. 2118, 80 L.Ed.2d 772, citing *Broadrick*, 413 U.S. at 613, 93 S.Ct. 2908, 37 L.Ed.2d 830.

1. The Driveway Provision[9]

Plaintiffs argue that the Driveway Provision is overbroad because it completely bans all expressive activity on a public sidewalk, including such traditionally favored activities as passive leafletting and handbilling. *See, e.g., Madsen*, 512 U.S. at --, 114 S.Ct. 2516, 129 L.Ed.2d at 610. Defendants, in turn, contend that the Driveway Provision is narrowly tailored because it is limited to a zone encompassing the driveway and the eight-foot region immediately adjacent thereto, an area different in kind from other areas surrounding the medical facility. In resolving this issue, this Court must determine whether the Ordinance burdens more speech than is necessary in order to serve the identified governmental interest of ensuring free ingress to and egress from the clinic. *Ward*, 491 U.S. at 791, 109 S.Ct. 2746, 105 L.Ed.2d 661.

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[9]The provision reads: "No person shall conduct any demonstration activity within the driveway area or within eight (8) feet of the driveway area of a health care facility or place of worship . . . No person shall impede access to a driveway entrance of a health care facility or place of worship by any conduct which delays or impedes the flow of pedestrian or vehicular traffic in or out of such facility."

"In a facial challenge to the overbreadth and vagueness of a law, a court's first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct." *Hoffman Estates*, 455 U.S. at 494, 102 S.Ct. 1186, 71 L.Ed.2d 362; *Kolender v. Lawson*, 461 U.S. 352, 359, n. 8, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983). In this case, it is apparent from the face of the Driveway Provision that all expressive activity, whether peaceful or harassing, vocal or silent, is prohibited within the eight-foot zone on either side of the driveway leading to the clinic.[10] Defendants have thus banned all forms of expressive activity, even silent prayer or expressive t-shirts, from the driveway areas of every medical facility and place of worship in Santa Barbara.

It is axiomatic in American constitutional jurisprudence that the state cannot prohibit all protected forms of expressive activity in a public forum. *See, e.g., Airport Comm'rs v. Jews for Jesus, Inc.*, 482 U.S. 569, 575, 107 S.Ct. 2568, 96 L.Ed.2d 500 (1987) ("We think it obvious that such a ban cannot be justified even if LAX were a nonpublic forum because no conceivable governmental interest would justify such an absolute prohibition of speech"); *Madsen*, 512 U.S. at --, 114 S.Ct. at 2516, 129 L.Ed.2d at 610 (noting distinction between focused picketing, which may be banned, and "generally disseminated communication that cannot be completely banned in public places, such as handbilling and solicitation"); *Frisby*, 487 U.S. at 486, 108 S.Ct. at 2495, 101

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[10]The ordinance explicitly defines "demonstration activity" as "all expressive and symbolic conduct, whether active or passive, which shall include but not be limited to, protesting, picketing, distributing literature, and engaging in oral or silent protest, education or counseling activities." *See* 9.99.010(D). The Driveway Provision apparently excepts expressive conduct engaged in by individuals attempting to traverse the driveway.

L.Ed.2d 420 ("The type of focused picketing prohibited by [the state court injunction] is fundamentally different from more generally directed means of communication that may not be completely banned in [public places]"); *Perry Educational Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 45, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983) (in traditional public forum, "the government may not prohibit all communicative activity"); *Gerritsen v. City of Los Angeles*, 994 F.2d 570, 577 (9th Cir. 1993) (invalidating ordinance which prohibited handbilling within certain limited areas of public park).

The Driveway Provision effectively creates a First Amendment "free zone" in which no one may engage in expressive activity of any kind. *See Jews for Jesus*, 482 U.S. 569, 574, 107 S.Ct. 2568, 96 L.Ed.2d 500. Such a blanket ban necessarily prohibits more expressive conduct than is necessary to achieve the purpose of the Ordinance. Like the resolution at issue in *Jews for Jesus*, the Driveway Provision "prohibits even talking and reading, or the wearing of campaign buttons or symbolic clothing" within eight feet of every driveway leading up to every medical facility and place of worship in Santa Barbara. *Id.* It also prevents traditionally favored activities such as leafletting and handbilling. See *Ward*, 491 U.S. at 799, n. 7, ("[A] ban on handbilling, of course, would suppress a great quantity of speech that does not cause evils that it seeks to eliminate"); *accord Sabelko*, 846 F.Supp. at 820 ("The overbreadth of the Ordinance is most evident insofar as it restricts passive leafletting and handbilling even though the Supreme Court has warned against time, place and manner restrictions on such conduct in the public forum").

Although the driveways leading to medical clinics are arguably distinguishable from other public fora, *see Gerritsen*, 994 F.2d at 576, the conduct prohibited must still be narrowly defined vis-a-vis the governmental interest the restriction purports to serve.

The disputed language in this case is far broader than the language used in ordinances and injunctions challenged elsewhere, insofar as it encompasses the entire universe of expressive activity.[11] This Court notes that the Driveway Provision carves out an exception for individuals merely attempting to traverse the driveway area; presumably an individual traversing the driveway while incidentally engaging in expressive activity would not violate the face of the Ordinance.[12] Despite this narrow proviso, however, the Driveway Provision still criminalizes expressive activity *qua* expressive activity, without relating such expression to its effect on impeding access to the clinic.[13] Such a sweeping ban on protected First Amendment activity cannot withstand constitutional scrutiny. It is simply not narrowly tailored to achieve its averred purpose,

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[11]Even the ordinance struck down in *Sabelko*, 846 F.Supp. 810, which generally tracks the Santa Barbara ordinance, contains the more restrictive definition of demonstration activity, as including but not limited to "protesting, picketing, distributing literature, attempting to impede access, or engaging in oral protest, education, or counseling activities." *Id.* at 814.

[12]Specifically, the Driveway Provision states:

> ". . . provided however that it shall be lawful for a person to use a public sidewalk or street right-of-way adjacent to a health care facility or place of worship in order to traverse a driveway area." 9.99.030.

[13]One need look no further than the record before this Court to find an example of the overbreadth of the Driveway Provision. At least one anti-abortion demonstrator has been cited under the Ordinance for stepping into the eight-foot driveway zone to give literature to someone. *See* Plaintiffs' Supplemental Offer in Support of Their Motion for Preliminary Injunction, 5:7-9.

the protection of ingress to and egress from clinics and churches.[14]

Defendants urge this Court that any overbreadth problem in the language of the Driveway Provision is cured by the narrow construction of the Ordinance. It is axiomatic, however, that Santa Barbara cannot avoid the overbreadth problem by narrowing the problematic provision through selective enforcement:

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[14]This Court notes that other driveway buffer zones with a more narrowly defined realm of prohibited activity have been upheld. *See, e.g.*, *Madsen*, 512 U.S. at --, 114 S.Ct. at 2516, 129 L.Ed.2d at 611 (upholding absolute ban on "congregating, picketing, patrolling, demonstrating or entering" any property within thirty-six feet of the clinic's property line). In so holding, the *Madsen* court noted: "We also bear in mind the fact that the state court originally issued a much narrower injunction, providing no buffer zone, and that this order did not succeed in protecting access to the clinic." *Id.* See also *Pro-Choice Network v. Schenck*, 1994 WL 480642, *9 (2d Cir. September 6, 1994) (finding unconstitutionally overbroad an injunction creating a 15-foot buffer zone permitting two demonstrators at a time to enter and engage in sidewalk counselling but noting that, "a different record revealing greater intransigence by Project Rescue might well support a more restrictive injunction..."); *Portland Fem. Women's H. Ctr. v. Advocates for Life*, 859 F.2d 681, 686 (9th Cir. 1988) (upholding injunction establishing a 25-foot buffer zone against "demonstrating or distributing literature" on the sidewalk in front of the clinic).

This Court notes as well that the final sentence in § 9.99.030, not challenged here, appears to serve the governmental interest of securing safe and unimpeded access to clinics and churches without triggering the same overbreadth problems.

> It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large.

Hill, 482 U.S. at 466, 107 S.Ct. at 2502, 96 L.Ed.2d 398, citing *United States v. Reese*, 92 U.S. 214, 221, 23 L.Ed. 563 (1876). According the policy "unconstitutional discretion in enforcement" does not save an overbroad ordinance. *Id.* Criminal statutes such as the one at issue here must be scrutinized with particular care, *see, e.g., Winters, supra*, 333 U.S. at 515, 68 S.Ct. 665, 92 L.Ed.2d 840; those that make unlawful a substantial amount of constitutionally protected conduct may be held invalid even if they also have legitimate application. *E.g., Kolender*, 461 U.S. at 359, n. 8, 103 S.Ct. at 1855, 75 L.Ed.2d 903.

In this case, the Driveway Provision fails to pass muster under the First Amendment because it incorporates the constitutional infirmity of the Ordinance's overbroad definition of demonstration activity and thereby criminalizes the entire universe of expressive activity. Such overbreadth cannot be saved by selective enforcement, no matter how well intentioned. This Court must thus conclude that the Driveway Provision sweeps too broadly.

This Court does not envy city councils across the country the difficult and thankless job of crafting an ordinance that strikes a constitutional balance between ensuring women free access to clinics, often at a difficult and personal moment in their lives, and protecting the First Amendment rights of individuals who disagree with the choice these women are making. Nor is this Court heedless of the increasing violence against clinics here in California and throughout the country. However, legislatures may not seek

to redress these societal problems by enacting measures as distinctly overbroad as the one before this Court.

For the foregoing reasons, Defendants' motion for summary judgment as to the Driveway Provision is **DENIED**, and Plaintiffs' motion for a preliminary injunction against enforcement of the Driveway Provision is **GRANTED**.

2. The Bubble Zone Provision

Plaintiffs contend that the Bubble Zone Provision is overbroad because its mandatory withdrawal provision is impermissibly based upon the emotive impact of lawful First Amendment activity on the audience.[15] Defendants, in turn, argue that the Bubble Zone is simply a form of "legislated politeness" which allows harried passersby to traverse areas of protest.

As an initial matter, this Court notes that violation of the Bubble Zone Provision entails hindering or impeding access to medical facilities and places of worship while engaging in demonstration activity. To the extent that the definition of "demonstration activity" is overbroad, the Bubble Zone Provision suffers from the same constitutional infirmity as the Driveway Provision, *supra*. However, the overbroad definition of demonstration activity, in isolation, fails to invalidate the Bubble Zone Provision because the demonstration activity is only incidental

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[15]That such impact was of concern to the drafters is readily apparent from the face of the Ordinance. *See, e.g.*, Preamble, Ord. 4812 at 1 (noting the "averse physiological and emotional effects of . . . harassing or intimidating activities directed . . . from extremely close proximity.")

to the conduct regulated by the provision.[16] The Bubble Zone Provision must stand or fall on the constitutionality of the specific prohibition of "impeding" or "hindering" ingress to and egress from the clinic.

The explicit language of the Bubble Zone Provision defines the prohibited conduct as follows:

> No person, in the course of demonstration activity . . ., shall impede or hamper the free access to or departure from any health care facility or place of worship *by failing to withdraw immediately* to a distance of at least eight (8) feet away from any person who has requested such withdrawal.

9.99.020(A) (emphasis added). The provision further states that "impede" or "hamper" means "to obstruct, hinder or delay." *Id.* It is undisputed that a narrowly drafted prohibition on obstructing access to clinics is constitutional.[17] The provision challenged

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[16]This Court does note, however, that the literal language of the Ordinance appears to prohibit impeding access to clinics when committed in the course of demonstration activity, but not when such impeding is not incidental to an expressive purpose. To the extent that this result is intended, and not merely indicative of inartful drafting, it impermissibly singles out expressive activity. *See United States v. O'Brien*, 391 U.S. 367, 377, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968).

[17]Indeed, Plaintiffs in this case do not challenge the final sentence in 9.99.030, which states in relevant part:

> "No person shall impede access to a driveway entrance of a health care facility or place of worship by any conduct

(continued...)

here, however, defines "obstruct, hinder or delay" with the appositive phrase "by failing to withdraw immediately."[18] The

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[17](...continued)
which delays or impedes the flow of pedestrian or vehicular traffic in or out of such facility."

[18]This Court notes that there are two possible constructions of the prepositional phrase "by failing to withdraw ..." The first view is that the prepositional phrase syntactically renames the prohibited conduct "impede or hamper." Under this interpretation, failing to withdraw necessarily impedes access and hence violates the Ordinance. This is the view adopted by both parties and hence this Court. *See, e.g.*, City's Memorandum of Points and Authorities in Support of Summary Judgment Motion, 20:24-21:2 ("[I]f the demonstrator does not immediately withdraw upon an articulated withdrawal request, he or she is impeding and hampering access and violating the ordinance"); Council Agenda Report, with finished action, of April 20, 1993, 840 (discussing optimal personal space of eight feet in order to "reduce the impact of perceived hostile and angry behaviors directed at a person"); Ordinance Committee Council Agenda Report, April 30, 1993 ("A person's free speech is limited only within the 100 foot access area and *then only if requested by another individual within the eight foot bubble* . . .") (*emphasis added*).

The second view interprets the prepositional phrase "by failing to withdraw" as constituting a subset of impeding behavior singled out for prohibition. Under this view, failing to withdraw does not *per se* violate the provision. That is, the descriptions of the prohibited behavior are cumulative: The demonstrator must first actively impede access to the clinic, and the demonstrator must then fail to withdraw. This interpretation would pose difficult legal questions. *See* fn. 14, *supra*. However, since it is apparent to this

(continued...)

specific category of conduct the provision is designed to address is therefore the failure to withdraw upon request. The relevant inquiry for this Court is thus whether the creation of a bubble zone around visitors to the clinic and its immediate environs is a constitutional prohibition on expressive conduct.

The case law and the literal language of the Bubble Zone Provision indicate that it is. This Court notes at the outset that bubble zones more or less comparable to the one at issue here have not fared well recently. In *Madsen*, the Supreme Court struck down an injunction creating a 300-foot bubble zone around a clinic and a requirement that demonstrators refrain from physically approaching anyone unless and until such person indicates a desire to communicate. In so holding, the Court stated:

> [I]t is difficult, indeed, to justify a prohibition on *all* uninvited approaches of persons seeking the services of the clinic, regardless of how peaceful the contact may be, without burdening more speech than necessary to prevent intimidation and to ensure access to the clinic.

Madsen, 512 U.S. at --, 114 S.Ct. 2516, 129 L.Ed.2d at 613 (*emphasis in original*). In so holding, the Madsen court specifically stated that the prohibited speech must be independently proscribable (*e.g.*, fighting words or threats) and that the consent requirement alone is sufficient to invalidate the provision. *Id.*

Defendants attempt to distinguish the bubble zone in *Madsen*, which prohibited all approaches within a 300-foot radius

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[18](...continued)
Court that both parties construe the phrase as appositional, rather than conjunctive, this Court need not resolve the conceptual difficulties posed by the second possible interpretation.

of the clinic unless the listener first consents, from the Bubble Zone before this Court, which prohibits such activity only after the listener expresses his or her non-consent. It is clear that the "cease and desist" Bubble Zone challenged here is less restrictive than the "no approach" zone invalidated by *Madsen*. However, this distinction does not alone render the Bubble Zone narrowly tailored:

> [B]oth the cease and desist provision here and the no approach provision in Madsen operate to allow the prospective counselee to control the prospective counselor's opportunity to engage in protected expression. The provisions are thus equally restrictive of the communication offered by the counselors; both effectively condition the demonstrator's right to engage in protected expression on another person's wish to hear such expression.

Pro-Choice Network, 1994 WL 480642, *11 (striking down an injunction creating a fifteen-foot cease-and-desist bubble zone). See also *Sabelko*, 846 F.Supp. at 823 (striking down a permanent criminal injunction creating an eight-foot bubble zone as overbroad because it bans all expressive activity, including handbilling and leafletting, and vests enforcement power in private citizens); *Fargo Women's Health v. Lambs of Christ*, 488 N.W.2d 401 (N.D.1992) (striking down preliminary injunction that completely banned distributing literature to those unwilling to receive it).

The cease and desist provision challenged here, like the broader blanket provision invalidated in *Madsen*, sweeps too broadly.[19] The violation of both provisions is defined in the terms

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[19]Indeed, this Court notes that an anti-abortion protestor would violate the literal language of the Ordinance simply by handing (continued...)

of subjective listener reaction, an impermissibly overbroad basis for limiting expressive conduct that is itself not independently proscribable.[20] Accordingly, the Bubble Zone Provision is unconstitutionally overbroad; it is not readily subject to a narrowing construction by this Court, and its deterrent effect on expression is both real and substantial. *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 216, 95 S.Ct. 2268, 45 L.Ed.2d 125 (1975).

This Court realizes that the patients and visitors at medical facilities may be particularly vulnerable to solicitation and demonstration activities because entering a medical facility for any kind of treatment is inherently stressful. *See, e.g., International Society for Krishna Consciousness v. Lee*, 505 U.S. --, --, 112 S.Ct. 2701, 2708, 120 L.Ed.2d 541, 553 (1992) ("face-to-face solicitation presents risks of duress that are an appropriate target of regulation. The skillful, and unprincipled, solicitor can target the most vulnerable, including those accompanying children or those suffering physical impairment and who cannot easily avoid the solicitation.") Indeed, the language of the Preamble to the Ordinance indicates a belief that individuals entering and exiting medical facilities and places of worship are a captive audience to demonstration activity.

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[19](...continued)
literature to a willing recipient accompanied by and in close physical proximity to a clinic escort who requests that the protestor withdraw.

[20]As noted *supra*, this Court need not reach the question of whether the subjective nature of audience response to the demonstrators' message in this case also renders the Bubble Zone Provision content-based. See *Madsen*, 512 U.S. at --, 114 S.Ct. 2515, 129 L.Ed.2d at 613, n. 6.

Although this argument is intuitively appealing, *see, e.g.*, *Pro-Choice Network*, 1994 WL 480642, *16 (Oakes, J., dissenting) ("Women who want abortions have no choice but to brave the demonstrations en route to clinics. They are, in effect, a captive audience to the messages of the protestors"), this Court notes that Defendants cite no authority for applying the captive audience doctrine to individuals on public sidewalks en route to medical treatment. Indeed, the captive audience doctrine has traditionally been limited to situations where an individual is at home. *See Frisby*, 487 U.S. at 487. The captive audience doctrine has been applied only sparingly in public fora. *See, e.g.*, *Lehman v. Shaker Heights*, 418 U.S. 298, 94 S.Ct. 2714, 41 L.Ed.2d 770 (1974) (applying the captive audience doctrine to passengers on rapid transit buses). Moreover, the overbreadth problems plaguing the substance of the Driveway and the Bubble Zone Provisions render this case less amenable to a captive audience analysis. *See Sabelko*, 846 F.Supp. at 825, *citing City of Watseka v. Illinois Public Action Council*, 796 F.2d 1547 (7th Cir. 1986), *aff'd without opinion* 479 U.S. 1048, 107 S.Ct. 919, 93 L.Ed.2d 972 (1987).

Accordingly, after careful and difficult consideration, this Court finds the Bubble Zone Provision unconstitutionally overbroad. It is never easy to strike a balance between countervailing constitutional rights. The demonstrations outside of the Santa Barbara clinics no doubt inflict pain and stress on those who enter the clinic, whether for abortions or for other treatments. That such offense is part and parcel of the importance of First Amendment rights under the Constitution, *see, e.g.*, *Boos*, 485 U.S. at 322, 108 S.Ct. at 1157, 99 L.Ed.2d 333, is small comfort to those confronted with viewpoints they find objectionable at a time when they are most vulnerable to offense. It is equally clear to this Court, however, that those who passionately disagree with a woman's choice to engage in her constitutionally protected right

to abortion must be permitted the freedom to express their disagreement in a nonthreatening manner.

For the foregoing reasons, this Court **GRANTS** Plaintiffs' Motion for a Preliminary Injunction, and **DENIES** Defendants' Motion for Summary Judgment.

VII. VAGUENESS

Plaintiffs also make a vagueness challenge to the Ordinance. They argue that the Bubble Zone Provision is unconstitutionally vague because it makes the right to speak dependent on listener reaction. They also argue that the "demonstration activity" definition is impermissibly vague. However, this Court's conclusion that the Ordinance is overbroad makes it unnecessary to resolve these difficult questions.

VIII. APPLICATION TO THE MOTIONS

As set forth above, both the Driveway Provision and the Bubble Zone Provision are unconstitutional. Therefore, defendants' motion for summary judgment is **DENIED**; defendants are not entitled to judgment as a matter of law.

Plaintiffs have demonstrated that they will prevail on the constitutional merits. They have also demonstrated that the Ordinance deprives them of First Amendment freedoms, and thus irreparably injures them. *See, e.g., Elrod v. Burns*, 427 U.S. 347, 373, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976) (even brief deprivations of First Amendment freedoms constitute irreparable injury). Therefore, plaintiffs are entitled to a preliminary injunction. *Gilder*, 936 F.2d at 422. The motion for a preliminary injunction is **GRANTED**, and the City is hereby enjoined from

enforcing the Driveway Provision or Bubble Zone provision of the Ordinance.[21]

IX. CONCLUSION

Based on the foregoing, Plaintiff's motion for a preliminary injunction against enforcement of the Driveway and Bubble Zone Provisions is **GRANTED**. As two of the provisions of the Ordinance are unconstitutional, defendants' motion for summary judgment is **DENIED**.

IT IS SO ORDERED.

/s/ Richard A. Gadbois, Jr.
RICHARD A. GADBOIS, JR.
United States District Judge

Dated: March 13, 1995

APPENDIX

An Ordinance of the Council of the City of Santa Barbara Amending the Municipal Code By Adding a New Chapter 9.99 Pertaining to Access to Health Care Facilities

WHEREAS, provision of an access to health care services and to places of worship are critically and uniquely important to the public health, safety, and welfare so that persons desiring to provide or needing access to such

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[21]Pursuant to F.R.C.P. 65(c), Plaintiffs shall post a $5,000 bond as security for this preliminary injunction.

services should not be hampered, impeded, harassed or intimidated from providing or obtaining those services;

WHEREAS, persons attempting to access or depart from health care facilities and places of worship have been particularly subject to harassing or intimidating activity tending to hamper or impede their access to or departure from those facilities by persons approaching within extremely close proximity and shouting or waving objects at them;

WHEREAS, such activity near health care facilities and places of worship creates a "captive audience" situation because persons providing or seeking health care services or religious services cannot avoid the area outside of health care facilities or places of worship if they are to provide or receive the health care services or participate in the religious services and the physical and emotional ailments or conditions of patients can make them especially vulnerable to the adverse psychological and emotional effects of such harassing or intimidating activities directed at them from extremely close proximity;

WHEREAS, the adverse physiological and emotional effects created by such harassing or intimidating activities may pose health risks, interfere with medical treatment, diagnosis or recovery or cause persons to delay or forgo medical treatment;

WHEREAS, such harassing or intimidating activities that tend to hamper, hinder or impede provision of or access to health care services or to places of worship undermine a person's right to seek preservation of personal health and legitimate medical treatment, and interfere with a person's freedom of religion;

WHEREAS, this "captive audience" situation requires the enactment of reasonable time, place, and manner restrictions to separate and protect persons expressing their views and persons wishing to access health care facilities and places of worship without direct confrontation, hindrance, harassment or intimidation;

WHEREAS, this ordinance is a necessary time, place and manner restriction intended to reconcile and protect the First Amendment rights of persons near health care facilities and places of worship and the rights of persons seeking to use health care facilities or places of worship to be free from direct confrontation, hindrance, harassment, intimidation and harm;

WHEREAS, this ordinance does not preclude protesting, picketing, demonstrating, or counselling activities near a health care facility or place of worship, but is intended to preclude only those activities involving harassment, intimidation or intrusion which have the effect of foreclosing, hampering, or impeding access to health care services or places of worship and persons seeking to enter or leave health care facilities or places of worship; and

WHEREAS, existing law does not adequately protect such access to health care facilities or places of worship.

Now, therefore, the City Council of the City of Santa Barbara does ordain as follows:

SECTION I. Title 9 of the Santa Barbara Municipal Code is amended by adding Chapter 9.99 which reads as follows:

9.99.010 Definitions

As used in this Chapter, the following terms and phrases shall have the indicated meetings:

A. ACCESS AREA. Any portion of a public street or other public place or any place open to the public within one hundred (100) feet of the premises of a health care facility or place of worship.

B. HEALTH CARE FACILITY. Any medical or health facility, hospital or clinic within the City which is licensed under State law or any building, office or other place within the City regularly used by any health care provider licensed under State law to provide medical, nursing, or health care or advice to patients. A health care facility includes but is not limited to any buildings, appurtenances and grounds, entrances, parking facilities, and driveways.

C. PLACE OF WORSHIP. A place of worship includes but is not limited to any buildings, appurtenances and grounds, entrances, parking facilities, and driveways where persons gather to worship when the same are used solely and exclusively for religious worship.

D. DEMONSTRATION ACTIVITY. All expressive and symbolic conduct, whether active or passive, which shall include, but not be limited to, protesting, picketing, distributing literature, and engaging in oral or silent protest, education or counseling activities.

E. DRIVEWAY AREA. That portion of a street right-of-way (including a sidewalk) generally improved for the purposes of providing a vehicular access to adjacent private property. At the request of a health care facility or place of

worship, the City of Santa Barbara will indicate (such as through the use of painted lines) the perimeter boundaries of a driveway area.

9.99.020 Impeding Access Prohibited

A. DEMONSTRATION ACTIVITY--OBLIGATION TO WITHDRAW. No person, in the course of demonstration activity within the access area of a health care facility or place of worship, acting alone or in concert with others, shall impede or hamper the free access to or departure from any health care facility or place of worship by failing to withdraw immediately to a distance of at least eight (8) feet away from any person who has requested such withdrawal. "Impede" or "Hamper" means to obstruct, hinder or delay.

B. WITHDRAWAL. For the purposes of this Section, withdrawal may be requested by a person verbally, or by carrying or wearing a visible sign clearly indicating such withdrawal request. Statements by a person, or signs carried or worn by a person displaying words or symbols such as or similar in effect to "stop," "stop it," "withdraw," "back off," "get away," or "leave me alone" shall be sufficient to constitute a violation of this Section. Mere statements of opinion or disagreement made in the absence of a request to withdraw shall not be construed to be a request under this Section.

C. DISTANCE. Distance under this Section shall be measured from that part of the closest demonstrator's body that is nearest to the closest part of the requesting person' body. For purposes of the preceding sentence, the term "body" shall include any natural or artificial extension thereof, including, but not limited to, and outstretched arm or handheld sign.

9.99.030 Access to Driveway Areas

No person shall conduct any demonstration activity within the driveway area or within eight (8) feet of the driveway area of a health care facility or place of worship, provided however that it shall be lawful for a person to use a public sidewalk or street right-of-way adjacent to a health care facility or place of worship in order to traverse a driveway area. No person shall impede access to a driveway entrance of a health care facility or place of worship by any conduct which delays or impedes the flow of pedestrian or vehicular traffic in or out of such facility.

APPENDIX G

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 95-55595

VICKIE L. EDWARDS and KATHLEEN MCCAULLEY,

Plaintiffs-Appellees,

v.

THE CITY OF SANTA, BARBARA,

Defendant-Appellant.

MEMORANDUM*

Submitted November 20, 1995**
Filed November 22, 1995

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*This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3. Accordingly, appellees' request for oral argument is denied.

**The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a); 9th Cir. R. 34-4.

Before: PREGERSON, NORRIS, and REINHARDT, Circuit Judges.

We vacate the district court's preliminary injunction and remand for reconsideration of the motion for the preliminary injunction in light of *Sabelko v. The City of Phoenix*, No. 94-15495, slip op. 13739 (9th Cir. Oct. 19, 1995).

VACATED AND REMANDED.[***]

[***]The various applications for leave to file amicus briefs are denied.

APPENDIX H

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 94-15495

KATHERINE SABELKO and NANCY BARTO,

Plaintiffs/Appellees,

vs.

THE CITY OF PHOENIX, et al.

Defendants/Appellants.

MOTION FOR LEAVE OF COURT TO FILE BRIEF OF AMICI CURIAE

Dated July 11, 1994

Pursuant to Local Rule 29 of the Federal Rules of Appellate Procedure for the Ninth Circuit, *Amici Curiae*, the City of San Jose, a municipal corporation, *et al.*, hereby apply for leave of the Court to file a brief as *amici curiae* in the above-entitled matter.[1]

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[1]The following *amici* have authorized the City of San Jose, to include them as an *amicus curiae* in the brief of *amici curiae* in this

(continued...)

Amici are thirty-four cities throughout the State of California who have enacted or would like to enact ordinances similar to the ordinance adopted by the City of Phoenix, Arizona, at issue in this case, in order to protect and preserve the right to access health care and the privacy rights of patients and staff at and around health care facilities in a way which balances and protects the free speech rights of demonstrators.

Additionally, *Amici* have a grave interest in protecting the health and safety of all its citizens. There has been an alarming increase in incidences of violence in and around health care facilities in recent years, escalating to include bombings, fires and even murder. Faced with these very real threats of harmful, even deadly, encounters around health care facilities, citizens have turned to their cities seeking protection.

Amici will argue that the Ordinance at issue addresses important and legitimate governmental interests applicable to all cities, that it was carefully crafted by the City of Phoenix in the narrowest possible manner necessary to constitute a constitutional and reasonable place and manner restriction on expressive conduct, and that it protects First Amendment rights while also safeguarding the health and safety of persons seeking access to health care, treatment and services.

---

[1](...continued)
matter: Belmont, Burlingame, Capitola, Carlsbad, Chula Vista, Clearlake, Cloverdale, Dana Point, Dinuba, Eureka, Hayward, Healdsburg, Holtville, Huron, Laguna Beach, Los Angeles, Monte Sereno, Monterey, Napa, Orange Cove, Pico Rivera, Piedmont, Pleasanton, Redlands, Rohnert Park, San Francisco, San Rafael, Santa Barbara, Sonoma, Sunnyvale, Thousand Oaks, Walnut and West Hollywood.

Amici have familiarized themselves with the issues and questions presented in this appeal and the scope of their presentation thus far by reading the briefs of the parties prepared for the District Court of Arizona and the opinion of the District Court of Arizona. *Amici* would like to assist this Court further by presenting additional, but not duplicative, needed information for the Court's consideration on the serious governmental interests at stake in this case.

If the court grants this motion for leave of the Court to file the *amici* brief, then *Amici Curiae* respectfully requests that the court permit filing of the brief that accompanies this motion.

Respectfully submitted,

JOAN R. GALLO, City Attorney
City of San Jose

/s/ By: Ralph C. Greene #57160
for GEORGE RIOS
Assistant City Attorney
Counsel for *Amici Curiae*
City of San Jose, *et al.*

(2)

Supreme Court, U.S.
FILED
APR 18 1996
CLERK

No. 95-1415

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

KATHERINE SABELKO and NANCY BARTO,
Petitioners,

v.

THE CITY OF PHOENIX, *et al.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

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17pp

QUESTION PRESENTED

Whether the First Amendment is violated by a city ordinance that requires demonstrators within 100 feet of a health care facility to move eight feet away from a person who makes a "clearly communicated request" that they move away.

PARTIES TO THE PROCEEDING

The petitioners are named in the caption. In addition to the City of Phoenix, the respondents are Skip Rimsza, in his official capacity as Mayor of the City of Phoenix, and Dave Siebert, Frances Emma Barwood, Peggy Bilsten, Craig L. Tribken, John Nelson, Sal DiCicco, Doug Lingner, and Cody Williams in their official capacities as members of the City Council of the City of Phoenix. This list differs from that given in the petition because we have substituted, for the parties named in the petition, their successors in office. See Sup. Ct. R. 35.3.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-1415

KATHERINE SABELKO and NANCY BARTO,
Petitioners,

v.

THE CITY OF PHOENIX, *et al.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

STATEMENT

1. Section 23-10.1 of the Phoenix City Code makes it unlawful for any person "in the course of demonstration activity" within 100 feet of a health care facility to "fail to withdraw upon a clearly communicated request to do so to a distance of at least eight (8) feet away from any person who has made the request." § 23-10.1(A).[1]

[1] Specifically, Section 23-10.1 applies to the "access area" of a health care facility. "Access area" is defined as any portion of a public street "or other public place or any place open to the public"

"Demonstration activity," as defined by the ordinance, "includes but is not limited to protesting, picketing, distributing literature, attempting to impede access, or engaging in oral protest, education, or counseling activities." The ordinance also defines "[h]ealth care facility" and specifies how to measure the eight-foot distance. § 23-10.1(B)(3) and (C); see Pet. App. 57a-58a.

Six days after Phoenix enacted Section 23-10.1, petitioners filed this suit in the United States District Court for the District of Arizona. Petitioners describe themselves as "antiabortion sidewalk counselors" (Pet. App. 4a) who wish to stand near health care facilities so that they can approach women whom petitioners believe are considering having abortions. According to their complaint, petitioners wish to persist in face-to-face conversation with those women even after the women ask them to desist. See C.A.E.R. Tab 4 at 2-5, Tab 5 at 2-5.[2] Petitioners asserted that Section 23-10.1 violates the First Amendment.

The district court enjoined the enforcement of Section 23-10.1. Pet. App. 22a-53a. The district court issued its decision after the grant of certiorari in *Madsen v. Women's Health Center, Inc.*, 114 S. Ct. 2516 (1994), but before this Court's decision in that case.[3] The district court concluded, among other things, that Section 23-10.1 "impose[d] criminal liability depending on the content and viewpoint of speech" (Pet. App. 35a); that Section 23-10.1 is, in any event, "not narrowly tailored to achieve the governmental interest specified" (Pet. App. 36a); that Section 23-10.1 is "unconstitutionally overbroad"

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that is "within one hundred (100) feet of an exterior wall or entryway of a health care facility." § 23-10.1(B)(1).

[2] "C.A.E.R." refers to the Excerpts of Record filed in the court of appeals.

[3] The district court acknowledged that *Madsen* was before this Court but said that it saw no need to wait for this Court's decision. See Pet. App. 27a-28a.

(Pet. App. 40a) and "unconstitutionally vague" (*id.* at 45a); and that Section 23-10.1 "does not leave open ample alternative channels of communication" (Pet. App. 46a).

2. The United States Court of Appeals for the Ninth Circuit, relying on *Madsen* and other decisions of this Court, reversed. Pet. App. 1a-10a. In *Madsen* this Court upheld, in part, an injunction forbidding certain activities by named antiabortion demonstrators near an abortion clinic in Melbourne, Florida. See 114 S. Ct. at 2521-22. The Ninth Circuit stated that it could "find no basis for holding the Phoenix ordinance less content neutral than the Florida injunction." Pet. App. 6a. The court of appeals also noted that in *Madsen*, this Court had ruled that an injunction directed at specific individuals is subject to more exacting scrutiny under the First Amendment than an ordinance of general applicability would be. Pet. App. 7a, citing *Madsen*, 114 S. Ct. at 2524-25. Specifically, a general ordinance, like Section 23-10.1, will be upheld "if it is 'narrowly tailored to serve a significant governmental interest, and leave[s] open ample alternative channels of communication.'" Pet. App. 7a (brackets in original), quoting *Perry Educ. Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 45 (1983).

The court of appeals ruled that the Phoenix ordinance was supported by interests that this Court, in *Madsen*, had specifically held to be sufficiently weighty to justify a content-neutral measure. Pet. App. 7a-8a, citing *Madsen*, 114 S. Ct. at 2526. The court of appeals further concluded that "[t]he provisions of the ordinance challenged in this case are no more vague than those of the injunction in *Madsen*." Pet. App. 8a.

Finally, the court held that Section 23-10.1 was sufficiently narrowly tailored, for several reasons. See Pet. App. 10a. First, Section 23-10.1 does not prohibit "uninvited approaches" but instead allows any demonstrator to approach any individual "until the individual affirma-

tively requests a disengagement." Second, Section 23-10.1 places no limit at all on activity conducted more than 100 feet from a health care facility. Finally, even after an individual asks a demonstrator to move away, "communication is not prohibited" but simply must take place at a distance of eight feet. The court concluded by noting that under Section 23-10.1 "there is no bar to signs, placards, or pictures" and that "[c]ounselors can handbill and approach anyone outside the 100-foot [limit], and anyone within the 100 feet until and unless that person objects." Pet. App. 10a. Judge Beezer dissented. *Id.* at 10a-19a.

ARGUMENT

The court of appeals correctly applied principles that are firmly established by this Court's cases. The court of appeals' decision also does not conflict with the decision of any other lower court. Further review is therefore unwarranted.

We note that on March 18, 1996, the Court granted certiorari in *Schenck v. Pro-Choice Network of Western New York*, No. 95-1065, a case that petitioners claim involves a measure that is "similar" to Section 23-10.1. See Pet. 10. As we explain below, *Schenck*, which concerns not an ordinance but an injunction, is in fact significantly different from this case, and the grant of certiorari in *Schenck* does not make review any more appropriate here. Should the Court decide not to deny the petition here, however, we believe that the better course—given the dissimilarities between this case and *Schenck*—would be not to hold this petition pending the outcome in *Schenck* but rather to grant the petition in this case and schedule this case for plenary briefing and argument.

1. The court of appeals' decision represents a straightforward application of principles that are well settled under this Court's decisions in *Madsen v. Women's Health Center, Inc.*, 114 S. Ct. 2516 (1994); *Perry Educ. Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37

(1983); *Ward v. Rock Against Racism*, 491 U.S. 781 (1989); *Frisby v. Schultz*, 487 U.S. 474 (1988); and numerous other cases. In *Madsen*, the Court considered a First Amendment challenge to an injunction that affected expression. The Court ruled that an injunction would be subject to a "more stringent" First Amendment standard than would "a generally applicable ordinance" (114 S. Ct. at 2524). An ordinance, the Court said, would be "assessed under the standard set forth in *Ward* . . . and similar cases": the question would be whether the ordinance is " 'narrowly tailored to serve a significant governmental interest.' " 114 S. Ct. at 2524, quoting *Ward*, 491 U.S. at 791. See also *Perry*, 460 U.S. at 45; *Frisby*, 487 U.S. at 482.

Petitioners do not deny that this well-established standard—whether the ordinance is "narrowly tailored to serve a significant governmental interest"—applies to Section 23-10.1. As the Ninth Circuit explained, under *Madsen* there is no question that the interests served by Section 23-10.1 are—at the very least—"significant." Petitioners do not appear to contest this point either. The only remaining question is whether Section 23-10.1 is "narrowly tailored." Petitioners do not cite any decision, from this Court or any other court, in which a statute or ordinance like Section 23-10.1 has been held to be insufficiently narrowly tailored.

Indeed it is hard to imagine a measure more "narrowly tailored" than Section 23-10.1. Section 23-10.1 has no application at all except within 100 feet of a health services clinic. Within that area, it does not restrict speech in any way unless a specific person has "clearly" requested that a demonstrator move away. And even then, the demonstrator need only withdraw to a distance of eight feet—a distance across which people communicate easily and routinely every day, on the street, in offices, and in countless other settings.

2. Instead of addressing the standard repeatedly specified by this Court for assessing measures like Section

23-10.1, petitioners assert that Section 23-10.1 is invalid because it constitutes "an 'audience veto' restriction on speech." Pet. 10; see Pet. i, 12, 13, 14, 21. This argument rests on a simple misunderstanding of the Court's decisions. The Court has ruled that the hostility of some members of a speaker's audience is generally not a reason to restrict a speaker's ability to reach *other* members of the audience, or members of a broader audience. See, *e.g., Forsyth County v. The Nationalist Movement*, 505 U.S. 123, 134-35 (1992). It is in this sense that a "heckler" may not "veto" a person's speech. But of course Section 23-10.1 does not restrict speech in this way. Section 23-10.1 leaves petitioners free to speak to anyone they like, in any way they like, except for face-to-face confrontations with a specific individual who has specifically requested them to move away. Even then, petitioners may continue to speak to that individual from a distance of eight feet. There is no "veto" of anyone's speech —only of physically confrontational tactics.

The Court has repeatedly affirmed that the First Amendment does not give speakers a right to force themselves on unwilling individuals. See, *e.g., Frisby*, 487 U.S. at 488 (the government has a "substantial and justifiable interest" in prohibiting "speech directed primarily at those who are presumptively unwilling to receive it"); *Cox v. Louisiana*, 379 U.S. 536, 554-55 (1965); *Martin v. City of Struthers*, 319 U.S. 141, 148 (1943); *Schneider v. State*, 308 U.S. 147, 162 (1939); *International Society for Krishna Consciousness v. Lee*, 505 U.S. 672, 683-84 (1992). For example, in *Rowan v. United States Post Office Dept.*, 397 U.S. 728 (1970), the Court upheld the constitutionality of a law that forbade the mailing of material to homeowners who certified that they did not wish to receive it. Receiving material in the mail is far less intrusive than confronting a person face to face, as petitioners here wish to do; and the restriction upheld in *Rowan* had a far more significant effect on the speakers' ability to communicate than Section 23-10.1 does. Thus the con-

stitutionality of Section 23-10.1 follows *a fortiori* from *Rowan*. The decision below simply applies a well-established principle—as the Court put it in *Rowan*, "no one has a right to press even 'good' ideas on an unwilling recipient" (397 U.S. at 738)—to uphold a measure, Section 23-10.1, that implements this principle in a narrow and careful way.

For this reason, petitioners are mistaken when they assert (Pet. 10, 13-15) that the court of appeals' decision is inconsistent with the portion of *Madsen* that struck down a provision of the Florida injunction forbidding persons from "physically approaching any person seeking services of the clinic 'unless such person indicates a desire to communicate' in an area within 300 feet of the clinic." 114 S. Ct. at 2529. Among other things,[4] the injunction in *Madsen* forbade communication unless a person consented in advance; as petitioners concede (Pet. 14), Section 23-10.1 does no such thing, but rather requires a speaker to move away a short distance when asked to do so. The Court has emphasized the importance of this distinction: in *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983), for example, the Court invalidated a statute that forbade certain unsolicited mailings but explicitly distinguished *Rowan* on the ground that *Rowan* involved "addressees [who had] give[n] notice . . . that they wish no further mailings" (463 U.S. at 72). The same distinction—between unsolicited approaches and approaches that have been specifically rebuffed—distinguishes this case from the portion of *Madsen* on which petitioners rely.

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[4] *Madsen*, of course, involved an injunction, which is judged more strictly than an ordinance. In addition, this portion of the *Madsen* injunction extended 300 feet from the clinic, thus covering a much wider area than the 100-foot zone regulated by Section 23-10.1. And the terms of the *Madsen* injunction ("physically approaching" and "indicates a desire to communicate") are more vague than those of Section 23-10.1; the precision of Section 23-10.1 ensures that no constitutionally protected speech will be chilled.

3. Petitioners repeatedly speculate about possible situations in which Section 23-10.1 might be applied in a way that, according to petitioners, produces anomalous results. For example, petitioners try to describe a situation in which "escorts," by strategically positioning themselves in the 100-foot zone and then invoking Section 23-10.1, are able to prevent all face-to-face solicitation of any individual within that area. Pet. 11. Petitioners also repeatedly assert that the ordinance might be applied to a factory or school with a single nurse on the premises (*e.g.* Pet. 11, 19). But petitioners challenged Section 23-10.1 on its face, before it was applied in any case. They cannot sustain such a facial challenge by contriving a few vaguely defined hypothetical cases.

Were those cases to arise—of course, they might never arise—the Court would have before it a specific, concrete factual record that would enable it to decide whether the ordinance could constitutionally be applied to those facts. But as the Court explained in *Frisby v. Schultz*, where the parties challenging an ordinance preventing speech from being forced on unwilling listeners adopted a similar approach: "Particular hypothetical applications of the ordinance . . . may present somewhat different questions. . . . These are, however, questions we need not address today in order to dispose of [petitioners'] facial challenge." 487 U.S. at 488.

4. Petitioners erroneously assert that the decision below conflicts with the decisions in *United Food and Commercial Workers Int'l Union v. IBP, Inc.*, 857 F.2d 422 (8th Cir. 1988), and *Fargo Women's Health Organization, Inc. v. Lambs of Christ*, 488 N.W. 2d 401 (N.D. 1992). The Nebraska state law invalidated in *IBP* was utterly different from Section 23-10.1. The Nebraska law was explicitly based on the content of speech; it applied everywhere, not just in a 100-foot area like Section 23-10.1; it forbade all speech to an unwilling listener, not just speech from inches away; and rather than just requiring the speaker to move a specified short distance away,

it required the speaker to stop speaking altogether. As the Eighth Circuit explained (857 F.2d at 435):

> This clause applies by its terms to "talking or communicating in any manner with" any person in an effort to persuade that person to quit or refrain from seeking certain employment. . . . [This] clause could be applied to peaceful requests to honor a picket line, to attempts to inform strikebreakers of the union's grievances, and to general calls for worker solidarity.

Fargo Women's Health Organization is also wholly unlike this case. To begin with, *Fargo* is entirely distinguishable because it involved not an ordinance but an injunction, which is of course judged by a "more stringent" standard under *Madsen*. Beyond that, the injunction in *Fargo* prohibited all speech to an unwilling recipient, not just face-to-face speech from a distance less than eight feet. See 488 N.W. 2d at 407 n.1 (para. (e)). Moreover, in *Fargo* the restriction on speech was triggered by any "indicat[ion] that [an individual] do[es] not wish to be spoken to" (*ibid.*); Section 23-10.1 is far more specific, requiring a "clearly communicated request to withdraw." And so far as the distribution of literature is concerned, the court in *Fargo* specifically upheld a provision of the injunction that forbade demonstrators from "physically forc[ing] literature on passers-by" (488 N.W.2d at 411), thus making it clear that demonstrators could do no more than proffer literature from a reasonable distance. Section 23-10.1 is merely a more precise way of adopting a materially indistinguishable restriction.

5. The grant of certiorari in *Schenck v. Pro-Choice Network of Western New York*, No. 95-1065, should not affect the Court's disposition of this case. Not only are the factual specifics of *Schenck* different from this case in important ways; *Schenck* involves a substantially different legal standard as well. Consequently, lower courts faced with measures like Section 23-10.1 are unlikely to gain much guidance from any decision this Court reaches in *Schenck*. For that reason, there is no reason for the

Court to hold this petition and dispose of it in light of *Schenck*; the Court should simply deny this petition, for the reasons we have elaborated.

Should the Court disagree with us, however, and determine that the issues in this case warrant further review, we believe it would be appropriate to grant certiorari and schedule this case for plenary consideration. That would ensure that the Court has the legal issues presented by ordinances like Section 23-10.1 squarely before it, instead of resolving those issues *en passant*, or even inadvertently, in a case like *Schenck* that presents substantially different questions.

a. *Schenck* involves not an ordinance but a detailed injunction that imposed restrictions on demonstrators' ability to approach individuals outside health facilities. See 95-1065 Pet. App. A-12 to A-13. As we have noted, the Court held in *Madsen* that injunctions are subject to a "more stringent" standard than ordinances like Section 23-10.1. 114 S. Ct. at 2524. Indeed, *Madsen* explicitly ruled that the Court's "*standard* time, place, and manner analysis"—which applies to ordinances—"is not sufficiently rigorous" for injunctions. *Id.* at 2525 (emphasis added). It follows that a decision invoking the more rigorous, non-"standard" analysis applicable to injunctions will be of limited, if any, significance to this case.

Not only is the legal standard applicable to injunctions more rigorous; it is, as the *Madsen* opinion makes plain, less deeply rooted. The Court appears to have heard only a handful of cases in its history concerning the constitutionality, under the First Amendment, of content-neutral injunctions that limit speech. See 114 S. Ct. at 2524-25.[5]

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[5] The principal cases that the Court relied on in *Madsen* all involved injunctions that, at least arguably, referred to the content of speech: *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982); *Carroll v. President and Comm'rs of Princess Anne Cty.*, 393 U.S. 175 (1968); and *Milk Wagon Drivers v. Meadowmoor Dairies, Inc.*, 312 U.S. 287 (1941).

By contrast, as the Court remarked in *Madsen*, the legal standard for measures like Section 23-10.1—generally applicable legislation that affects speech but does not classify on the basis of content—has been "set forth" in numerous cases. See 114 S. Ct. at 2524. That standard is well established.

Consequently, were the Court to decide *Schenck* and then remand this case for reconsideration by the lower courts in light of *Schenck*, the lower courts would likely be left in uncertainty about whether the settled standards applicable to content-neutral statutes and ordinances had been altered in some way. In our view, those standards are clear, and the decision below is an unexceptional application of them. But if the Court disagrees with our assessment, we suggest that the best course would be for the Court to address those standards directly, rather than indirectly through a case involving injunctive relief.

b. *Schenck* also differs from this case in certain crucial factual respects. The injunction in *Schenck* forbade any approach to within fifteen feet of a person seeking access to a health care facility by any person other than "two sidewalk counselors." See 95-1065 Pet. App. A-13. The first question presented in *Schenck* concerns this restriction. See 95-1065 Pet. i. Section 23-10.1 contains no comparable provision. The first question presented in *Schenck* is, therefore, simply not materially related to this case and furnishes no reason to do anything but deny certiorari here.

The *Schenck* injunction goes on to provide, however, that the two sidewalk counselors must " 'cease and desist' from counseling" if "a person or group of people does not want to be counseled, or wants to leave or walk away." 95-1065 Pet. App. A-13. This provision of the *Schenck* injunction is the counterpart to Section 23-10.1. But Section 23-10.1, in addition to being more precise, requires only that the counselor withdraw to a distance of eight feet; the *Schenck* injunction sets a limit of fifteen

feet. This distinction may well be material for First Amendment purposes. For this reason, too, any decision in *Schenck* is likely to provide little or no guidance on the question of the constitutionality of Section 23-10.1.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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April 18, 1996

(3)

No. 95-1415

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

KATHERINE SABELKO and NANCY BARTO,
Petitioners,

v.

THE CITY OF PHOENIX, SKIP RIMSZA, in his official capacity as Mayor of the City of Phoenix, and THELDA WILLIAMS, FRANCES EMMA BARWOOD, CRAIG TRIBKEN, JOHN NELSON, KATHY DUBS, SALOMON F. LEIJA, and CALVIN C. GOODE, in their official capacity as members of the City of Phoenix City Council,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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ARGUMENT

I. INTRODUCTION

The Ordinance at issue allows a hostile audience to veto speech in a public forum by invoking a personal, speech-free "bubble." On March 18, 1996, this Court granted certiorari in *Schenck v. Pro-Choice Network of Western New York*, No. 95-1065, a case involving a substantially similar personal, speech-free "bubble" restriction contained in an *injunction*. 95-1065 Pet. App. A-13. The case at bar addresses a "bubble" *ordinance*. At least thirty-five Arizona and California cities have enacted, or intend to enact, "bubble" ordinances (depending on the outcome of this case). Pet. App. 98a-99a. This Court held a similar "consent" provision unconstitutional in *Madsen v. Women's Health Center, Inc.*, 114 S.Ct. 2516, 2529 (1994). However, the divided Ninth Circuit decision below distinguished *Madsen* as limited to injunctions and refused to invalidate the same restriction when implemented as an ordinance. Pet. App. 7a. Like *Madsen*, the *Schenck* case involves an injunction, not an ordinance. On this basis, the City attempts to distinguish *Schenck* in advance of this Court's decision in that case. This is in line with the Ninth Circuit's decision below that erroneously dismissed this Court's invalidation of the "consent" provision as a mere result of the higher level of scrutiny applicable to injunctions but not applicable to ordinances. Pet. App. 7a, 9a-10a. Adopting this reasoning, the City argues that whatever this Court's ruling in *Schenck*, it will not decide "the question of the constitutionality of Section 23-10.1, the Phoenix 'Bubble' Ordinance." City Opposition Brief (hereinafter "Opp.") at 12. There is every reason to believe that the thirty-five cities that desire their own "bubble" ordinances will agree with this argument, just as they did as joint amici in the Ninth Circuit. Pet. App. 98a.

This consideration weighs strongly in favor of granting the Petition for Certiorari. Until this Court addresses the

constitutionality of "bubble" restrictions codified as *ordinances*, the lower courts will be free to disregard or distinguish the Court's injunction decisions.

II. THE DECISION OF THE NINTH CIRCUIT DIRECTLY CONFLICTS WITH THIS COURT'S DECISION IN *MADSEN V. WOMEN'S HEALTH CENTER, INC.*[1]

If the Phoenix "bubble" provision were contained in an injunction, instead of an ordinance, it would clearly fail constitutional review under *Madsen*'s heightened level of scrutiny. Thus, the linchpin of the City's argument is the distinction between ordinances and injunctions, and their respective levels of scrutiny. Invoking the relatively lower level of scrutiny used for "generally applicable statutes," the City attempts to distinguish the "consent" provision invalidated in *Madsen*.

There is no dispute that, like the injunctive "consent" provision in *Madsen*, the "Bubble" Ordinance was imposed to prevent unwanted and offensive "anti-abortion" expression in the public fora near an abortion provider. CR 13, Ex. A at 1-2 (Planned Parenthood Aff.).[2] In *Madsen*, this Court stated, "If this were a content-neutral, *generally applicable* statute, instead of an injunctive order, its constitutionality would be assessed under the

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[1]The City does not dispute that the "Bubble" Ordinance restricts expression. Opp. at 5-6. Moreover, the City does little to defend the Ordinance against Petitioners' vagueness attack, arguing feebly that the restrictions struck down in *Madsen* were "more vague" than those at issue here. Opp. at 7 n.4.

[2]"CR" is the designation for the District Court Clerk's Record filed with the Ninth Circuit.

standard set forth in *Ward v. Rock Against Racism*, [491 U.S. 781 (1989)]." 114 S.Ct. at 2524 (emphasis added). The City latches onto this distinction and argues that *Madsen*, therefore, does not require invalidation of the Phoenix "bubble."

The City's reasoning is meritless for two reasons. First, the Ordinance is demonstrably unconstitutional even under the standard for "generally applicable" statutes. Second, the Ordinance is a content-based regulation of expression and therefore subject to the higher level of scrutiny.

A. Overbreadth

This Court explained in *Madsen* that injunctions and "generally applicable" ordinances are two very different regimes of speech regulation, having different advantages and presenting different dangers. See *Madsen*, 114 S.Ct. at 2524. The "Bubble" Ordinance, however, partakes the worst of both worlds. While the "Bubble" Ordinance, like an injunction, is limited in its application to defined "health care facilities," it is *not* limited in its speech restrictions to particular malefactors who have been responsible for disruption. It "enjoins" *all* law abiding persons, including those who wish to engage in peaceful and nonthreatening expression.

There is nothing in *Madsen* to suggest that the "consent" provision, like the "bubble" restriction here, would have passed muster had it been codified as an ordinance. Evaluated as "generally applicable" statutes, both the *Madsen* provision and the Phoenix "bubble" are unconstitutional because they "regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals." *Ward*, 491 U.S. at 799. "A statute is narrowly tailored if it targets and eliminates no more than the exact source of the 'evil' it seeks to remedy." *Frisby v. Schultz*, 487 U.S. 474, 485 (1988). The Phoenix

"bubble" claims its legitimacy as a means of protecting against "impeding" access and protecting against the "emotional effects of . . . harassing and intimidating activities." Pet. App. 56a. But the Ordinance goes drastically beyond this identified governmental interest by restricting peaceful and nonthreatening speech that does *not* impede and does *not* cause upsetting "emotional effects." Indeed, the "Bubble" Ordinance restricts speech even in the total *absence* of physical impediment, obstruction, threats, harassment, and emotional distress.

The City's opposition ignores the gross overbreadth of the Ordinance. Instead, it dismisses the overbreadth issue as a "few vaguely defined hypothetical cases." Opp. at 8.[3] It is revealing, however, that the City does *not* disagree that the Ordinance can be used in the manner described in the Petition. Further, the City itself agreed in the District Court that the Ordinance permits clinic "escorts" to censor the communications of counselors and leafletters attempting to communicate with willing recipients. CR 29 (Rptrs. Tr. at pp. 13-15).

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[3]The City observes that the "Petitioners do not cite any decision . . . in which a statute or ordinance like section 23-10.1 has been held to be insufficiently narrowly tailored." Opp. at 5. But the Eighth Circuit and the Supreme Court of North Dakota have invalidated analogous restrictions. See *infra* § IV. Further, two "bubble" ordinances have in fact been challenged on overbreadth grounds. Both were held unconstitutional by United States District Courts. A Santa Barbara "bubble" ordinance was held unconstitutional in *Edwards v. Santa Barbara*, 883 F.Supp. 1379 (C.D. Cal. 1995), Pet. App. 59a, vacated and remanded by the Ninth Circuit in light of its *Sabelko* decision. Pet. App. 96a. Similarly the District Court below held the Phoenix "Bubble" Ordinance unconstitutional on overbreadth grounds. *Sabelko v. City of Phoenix*, 846 F.Supp. 810 (D. Ariz. 1994). Pet. App. 22a.

Most significantly, the overbreadth of the Ordinance is contained in the language of the provision itself. For example, the Ordinance works a *total* ban on *all* unwanted speech within a "bubble."[4] It is axiomatic that "an absolute prohibition on speech" is unconstitutional. *Board of Airport Commissioners v. Jews for Jesus, Inc.*, 482 U.S. 569, 575 (1987); *United States v. Grace*, 461 U.S. 171, 181 (1983) ("total ban" on expression on a public sidewalk is unconstitutional). As noted above, under the Ordinance, a person within the "bubble" commits a crime even if he communicates to another person who wishes to receive the information.[5] Further, by extending the power to invoke the "bubble" to *all* persons, the Ordinance is substantially broader than the "consent" provision struck down in *Madsen*, which, by contrast, was specifically limited to "'person[s] seeking services of the clinic'." 114 S.Ct. at 2529. The *Madsen* "consent" provision was also limited to the *named* demonstrators in the injunctive order. *Id.* By contrast, the "Bubble" Ordinance "enjoins" all persons in the universe.

Adding to the overbreadth problems, the Ordinance operates at *any* "place used to provide . . . psychological, nursing

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[4]The "bubble" also can be increased to well beyond eight linear feet by raising an arm and extending a stick or pointer. See Ord. sec. 23-10.1 C (Pet. App. 58a).

[5]The City misstates and glosses the prohibitions of the "Bubble" Ordinance throughout its opposition brief. The Ordinance does not merely require a person to "move eight feet away from a person who makes a 'clearly communicated request' that they move away." Opp. at (i). It prohibits the utterance of all unwanted expression within the "bubble." Indeed, under the Ordinance, a person actually need *not* vacate the "bubble" if he discontinues all expression. See Ord. (Pet. App. 56a).

or [any] other health care services, including family planning counseling and pregnancy-related services." Ord. sec. 23-10.1 B 3 (Pet. App. 58a). The Ordinance thus restricts expression in the public fora near schools, many government buildings, and any business or factory where a "nurse" or "counselor" is present.

B. Content-Neutrality

Second, the Ordinance is content-based, and, therefore, subject to strict scrutiny. See *Madsen*, 114 S.Ct. at 2524; *Boos v. Barry*, 485 U.S. 312, 321 (1988) ("[A] content-based restriction . . . must be subjected to the most exacting scrutiny"); *Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd.*, 502 U.S. 105, 115-16 (1991) (Content-based regulations are "presumptively" invalid). The "Bubble" Ordinance was expressly enacted to protect persons from the "emotional effects" of "anti-abortion" expression. Pet. App. 56a. A regulation that restricts speech out of concern for its communicative impact is content-based. *Forsyth County, Ga. v. Nationalist Movement*, 505 U.S. 123, 134 (1992); *United States v. Eichman*, 496 U.S. 310, 317-18 (1990); *Texas v. Johnson*, 491 U.S. 397, 411-12 (1989); *Boos*, 485 U.S. at 321. Moreover, the prevention of "emotional effects" resulting from speech is an unconstitutional basis for restricting expression. See, e.g., *Hustler Magazine v. Falwell*, 485 U.S. 46, 55 (1988); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 910 (1982). Thus, the "Bubble" Ordinance is subject to the higher level of scrutiny.[6]

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[6]It is also highly doubtful that abortion facility "bubble" ordinances, like the Phoenix "bubble," should be considered statutes of *general* applicability for purposes of First Amendment analysis. The "Bubble" Ordinance does not restrict speech in the public fora near all buildings or businesses, but *only* those

(continued...)

III. THE CITY IGNORES THE UNCONTESTED RECORD BELOW, AND TURNS THE PUBLIC FORUM AND CAPTIVE AUDIENCE DOCTRINES ON THEIR HEADS.

The City argues that the Ordinance does not permit a "heckler's veto" because it leaves a speaker free to speak to any individual except the person "who has specifically requested them to move away." Opp. at 6. This is utterly false. The Ordinance empowers *any* person to order a speaker or leafletter to withdraw or discontinue his expression within the invoked "bubble" area. The Ordinance does not require that the intended recipient of the communication invoke the "bubble." Thus, the Ordinance enables a clinic "escort" or volunteer to prevent expression *even if the intended recipient wishes to receive it*. Obviously, it is one thing for a pregnant woman entering an abortion clinic to decide that she does not want to engage in discussion about alternatives to abortion; it is quite another thing for the State to silence the speaker on the basis of this desire. Worse yet, under the Phoenix Ordinance a clinic employee or volunteer can decide to stifle the speaker and prevent a possibly willing audience from receiving a communication.

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[6](...continued)
surrounding defined "health care facilities." Most significantly, it was conceded in the District Court that the actual target of the Ordinance is narrower still. The Ordinance is designed to restrict "anti-abortion" speech at abortion facilities. CR 13, Ex. A; CR 13 (Tr. of City Council Session). The fact that the Ordinance was expressly enacted for an abortion provider to restrict "anti-abortion" expression on nearby sidewalks triggers the same constitutional concerns that require heightened scrutiny of injunctions. See *Madsen*, 114 S.Ct. at 2524-25.

In fact, the City expressly *agreed* in the District Court that the "Bubble" Ordinance could be used in just this way. CR 29 (Rptrs. Tr. at pp. 13-15). Similarly, the Phoenix City Council was expressly informed during the legislative process that the Ordinance permitted abortion clinic personnel to censor the communications of sidewalk leafletters intended for persons accessing the clinic. CR 33 (testimony of Rev. Costantino and S. Riely). The Ninth Circuit's divided panel also recognized that the language of the Ordinance permitted such usage. Pet. App. 9a; and see Pet. App. 17a (Beezer, J., dissenting).

The City is equally incorrect in its argument that this Court's precedents permit a person to exercise a personal "audience veto" on speech he does not wish to hear or see. Opp. at 6. On the contrary, in a traditional public forum, such as a public sidewalk, the Court has made clear that persons are expected to avoid the unwanted message by simply walking away or averting their eyes. *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 209-11 (1975). Indeed, this rule applies even in some *nonpublic* fora, such as a courthouse. *Cohen v. California*, 403 U.S. 15, 21-29 (1971). As the Court stated in *Madsen*, addressing the "consent" provision, in the public forum "citizens must tolerate insulting and even outrageous speech." 114 S.Ct. at 2529. Thus, the City's argument, adopted by the divided Ninth Circuit panel, is demonstrably erroneous under the unbroken precedents of this Court. See, e.g., *Forsyth County, Ga.*, 505 U.S. at 134; *Eichman*, 496 U.S. at 317-18; *Johnson*, 491 U.S. at 411-12; *Boos*, 485 U.S. at 321. Requiring *the demonstrator to shut up or retreat*, as does the "Bubble" Ordinance, stands public forum doctrine on its head. See *Frisby*, 487 U.S. at 484 (except for the home, "we expect individuals simply to avoid speech they do not want to hear"); *Erznoznik*, 422 U.S. at 211 ("the burden falls upon the viewer [offended by the visual display] to avoid further bombardment of

his sensibilities simply by averting his eyes"); *Cohen*, 403 U.S. at 21 (same).

In *Madsen*, this Court observed that even if the government's intent is to protect persons from being "stalked" or "shadowed," a restriction placing the burden on a nonthreatening speaker to retreat is unconstitutional. 114 S.Ct. at 2529. "Absent evidence that the protesters' speech is independently proscribable (i.e., 'fighting words' or threats), or is so infused with violence as to be indistinguishable from a threat of physical harm, [the] provision [requiring the protestor to stop the expression or retreat] cannot stand." *Id.* at 2529.

The City chiefly relies on two cases, claiming, incorrectly, that they support a broad right of persons to censor unwanted expression in the public forum. Both decisions, however, were limited to the privacy of the home. *Frisby*, 487 U.S. at 483; *Rowan v. United States Post Office Dept.*, 397 U.S. 728 (1970).

IV. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF THE EIGHTH CIRCUIT AND THE NORTH DAKOTA SUPREME COURT.

The City attempts to gloss the conflict between the Ninth Circuit's decision below and the decisions of the Eighth Circuit in *United Food and Commercial Workers Int'l Union v. IBP*, 857 F.2d 422 (8th Cir. 1988), and the North Dakota Supreme Court in *Fargo Women's Health Organization, Inc. v. Lambs of Christ*, 488 N.W.2d 401 (N.D. 1992). Both decisions held similar restrictions on unwanted speech to be unconstitutional. The *IBP* case, like the present case, dealt with a statute. Like *Madsen* and *Schenck*, the *Lamb's of Christ* decision dealt with a similar restriction imposed by an injunction. The City's hair-splitting attempt to distinguish these cases only serves to underscore the need for this Court to

review the decision below and sort out the constitutional confusion in the lower courts.

CONCLUSION

This Court should grant the Petition for Certiorari.

Respectfully submitted,

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